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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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Pages 713 to 822

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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F.C.C. 73–743

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART O OF THE COMMISSION'S RULES TO PROVIDE FOR AUTHENTICATION OF LICENSING DOCUMENTS BY COMMISSION SEAL ONLY

ORDER

(Adopted July 6, 1973; Released July 10, 1973)

BY THE COMMISSION:

The purpose of this Order is to delete from the Rules the statement that the signature of the Secretary appears on license forms issued by the Commission. Effective July 1, 1973, such forms have been authenticated solely by the seal of the Commission and by the signature of an official of the issuing bureau or office, when such a signature is required on the authorizing document. To avoid application processing delays, the Commission will continue to use forms bearing the signature of the former Secretary of the Commission until new forms are available.

Accordingly, Part O of the Commission's Rules is amended to reflect this change. Authority for the attached amendment is contained in sections 4(i) and 303(r) of Communications Act of 1934, as amended. Because the amendment relates to internal Commission organization and internal procedure, the prior notice and effective date provisions of section 4 of the Administrative Procedures Act (5 U.S.C. 553) do not apply.

In view of the foregoing, IT IS ORDERED, effective July 1, 1973, That Part O of the Rules and Regulations is amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part O of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Section 0.204(c)(6) is revised to read:

§ 0.204 *The exercise of delegated authority:*

* * * * * * * * *

(c) * * *

(6) With the exception of license forms requiring the signature of an appropriate official of the issuing bureau or office, license forms bear only the seal of the Commission.

* * * * * * * * *

104-001—73——1

F.C.C. 73-715

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of BRANDYWINE-MAIN LINE RADIO, INC. For Renewal of Licenses of Stations WXUR and WXUR-FM, Media, Pa.	Docket No. 17141 Files Nos. BR-4178 and BRH-1320

ORDER

(Adopted July 3, 1973; Released July 5, 1973)

BY THE COMMISSION: COMMISSIONER WILEY NOT PARTICIPATING.

1. The Commission has before it a petition filed by Brandywine-Main Line Radio, Inc. on June 26, 1973 seeking reconsideration of the Commission's decisions of July 7, 1970 (24 FCC 2d 18) and February 11, 1971 (27 FCC 2d 565) in which the Commission denied Brandywine's application for renewal of the licenses of stations WXUR and WXUR-FM, Media, Pennsylvania, and denied a petition for reconsideration of that action. The renewal proceeding has been finally determined by the Commission and its decision has been sustained upon appeal with the Supreme Court denying a petition for a *writ of certiorari* on May 29, 1973. The present pleading is therefore out of time. See Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405.

2. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Brandywine-Main Line Radio, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73-729

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request of
BRANDYWINE-MAIN LINE RADIO, INC., WXUR AND WXUR-FM, MEDIA, PA.
For Stay or For Temporary Authorization To Continue To Operate WXUR and WXUR-FM

ORDER

(Adopted July 3, 1973; Released July 5, 1973)

BY THE COMMISSION: COMMISSIONER WILEY NOT PARTICIPATING.

1. We have for consideration the above-captioned request by Brandywine-Main Line Radio, Inc., (Brandywine) filed on June 26, 1973, for stay, or, in the alternative, for temporary authorization to continue to operate radio stations WXUR(AM) and WXUR-FM, Media, Pennsylvania, "until the Commission has authorized interim operation thereof by an applicant or applicants for the facilities, or by some other authorized party."

2. In support of its request for continued operating authority, Brandywine alleges that WXUR and WXUR-FM are the only stations in Media; and that they provide religious programming not otherwise available in the Philadelphia area, specifically, two one-hour Sunday church service programs, one by the Media Presbyterian Church, a non-fundamentalist church, and the other by the Bible Presbyterian Church (of which Dr. McIntire is the Pastor) in nearby Collingswood, New Jersey, as well as a number of other religious programs. Brandywine also cites our recent decision in *The Heart of the Black Hills Stations*, Docket Numbers 18,358-9, FCC 73-589, released June 5, 1973, in which we granted television stations KRSD-TV, Rapid City, South Dakota, and KDSH-TV, Lead, South Dakota, temporary authority to operate after the decision denying their renewal of license applications had become final.

3. Brandywine's request for stay pending action on its petition for reconsideration, which was also filed on June 26, 1973, has been rendered moot by our action this date dismissing its petition for reconsideration. We have carefully considered Brandywine's alternative request for temporary authority, but we do not believe that the circumstances of this case warrant favorable action. Although WXUR and WXUR-FM are the only radio stations licensed to Media, they have been operated, in fact, as predominately religious-programmed stations serving the Philadelphia area. This area is replete with radio service. There are 29 radio broadcast stations, AM and FM, licensed to Philadelphia alone, as well as several other radio stations licensed

to cities in the immediate area, such as, for example, Camden, New Jersey. Two of these stations, WTEL(AM), Philadelphia, and WKDN–FM, Camden, New Jersey, are identified by the National Religious Broadcasters as "religiously oriented stations." It is apparent, therefore, that the termination of operation by WXUR and WXUR–FM will not deprive the Philadelphia area of religious programming, or of any substantial portion of radio broadcast service.

4. The Commission has authorized continued operation by a broadcast licensee whose renewal has been denied or its license revoked only in the most unusual circumstances. In fact, Brandywine cites only one case, *The Heart of the Black Hills Stations*, *supra*. In that case, we found continued operation to be in the public interest only because the alternative would have been to leave the viewing public in the areas concerned with only one television broadcast service. In view of the many radio broadcast stations which will continue to be available to the listening public in the Media-Philadelphia area, including two stations which, as noted above, broadcast religious programs, we cannot find that circumstances exist which would warrant granting continued operating authority to an entity that we have found unqualified to hold a broadcast license. Accordingly, Brandywine's alternative request for temporary authority will be denied.

5. In view of the foregoing, IT IS ORDERED that the above-captioned request of Brandywine-Main Line Radio, Inc., for stay IS HEREBY DISMISSED, and that its request for temporary authorization to continue to operate stations WXUR and WXUR–FM IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-247

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y.	Docket No. 11227
For Special Service Authorization to Operate Additional Hours From 6 a.m., e.s.t. to Sunrise, New York, N.Y., and From Sunset, Minneapolis, Minn.	File No. BSSA-266
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y.	Docket No. 17588
	File No. BP-16148
MIDWEST RADIO-TELEVISION, INC. (WCCO) MINNEAPOLIS, MINN.	Docket No. 19403
	File No. BP-19151
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1973; Released July 9, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. Before the Review Board is a petition to enlarge issues, filed January 24, 1973, by Midwest Radio-Television, Inc. (WCCO), requesting the addition of the following issues against the City of New York Municipal Broadcasting System (WNYC):

(a) To determine whether the transmitter site proposed by the City of New York Municipal Broadcasting System is actually available to it.

(b) To determine whether the City of New York Municipal Broadcasting System has failed to keep its application current as required by Section 1.65 of the Commission's Rules.

(c) To determine whether the City of New York Municipal Broadcasting System has misrepresented its proposal for the location of its antenna site to the Commission, to the public, or to any other official, government agency, body or representative.[1]

2. In March, 1964, WNYC filed an application to move from its present antenna site to a 50-acre portion of the Seaview Hospital Grounds on Staten Island in order to increase power and to accommodate a six-tower directional array. WCCO contends that during a November 14, 1972, hearing session, public witnesses made certain disclosures which indicate that the antenna site proposed by WNYC is not available for that use and that WNYC has failed to keep the Commission fully and accurately apprised of the status of its proposed

[1] Also before the Board for consideration are: (a) Broadcast Bureau's comments, filed February 2, 1973; (b) opposition, filed February 6, 1973, by WNYC; and (c) reply, filed February 16, 1973, by WCCO

site.[2] In support of its request for a site availability issue, WCCO first alleges that on April 24, 1970, New York City (City) leased a part of the proposed antenna site at Seaview to the Jewish Community Center (Center) for a campsite and other recreational purposes for a 75-year term. According to petitioner, the lease contains a covenant for a quiet enjoyment which would prohibit the necessary encroachment of the proposed ground system on the Center's property.[3] Second, WCCO notes that in June, 1970, the City leased its hospitals and facilities to the New York City Health and Hospital Corporation, including the remainder of WNYC's proposed site, for an indefinite term. Petitioner asserts that according to its enabling statutes,[4] the directors of the Hospital Corporation must approve every disposition of the corporation's real estate, and that no such approval has yet been given with respect to WNYC's proposed antenna site.[5] Finally, noting that the New York City Site Selection Board is responsible for selecting sites for all capital projects of the City, petitioner alleges that in the almost nine years since its application was filed, WNYC has not obtained Site Selection Board approval of the Seaview property for its proposed antenna site.[6] In view of these actions by the City, which WCCO alleges are inconsistent with WNYC's proposal, petitioner asserts that it is incumbent upon WNYC to offer something more than mere assurances from the applicant that the site will be available. Petitioner cites *WATR, Inc.*, 28 FCC 2d 501, 21 RR 2d 675 (1971) in support of its request. As a related matter, WCCO argues that since WNYC has failed to report these developments which, it contends, constitute "a substantial change as to . . . [a] . . . matter which may be of decisional significance . . .", a Rule 1.65 issue is warranted. Finally, in support of its contention that WNYC has not been prosecuting its antenna site proposal in good faith, WCCO argues that the City's conveyance of its antenna site to non-City organizations without any reservation of use for WNYC is not consistent with a continuing intent to use the property for WNYC's site. Moreover, petitioner claims that certain City officials have been representing to City governing bodies and to the public that the City was not committed to the use of the Seaview site and might actually use another.[7] These

[2] The Board is constrained to point out that WCCO's petition is predicated, in large part, on facts which have been available for a considerable length of time. However, in view of the serious nature of the allegations raised by the petitioner, the requests for additional issues will, nevertheless, be examined on their merits. See *The Edgefield-Saluda Radio Co. (WJES)*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[3] Although it would have been preferable for petitioner to have submitted copies of the leases in question, the Board will consider the sections relied upon by petitioner since they are quoted and are not disputed.

[4] Petitioner refers to, but does not quote Hospital Corporation Law, Section 7385.6, 7387.4.

[5] The Board of Estimate must also consent to the transfer of the proposed antenna site from the Hospital Corporation to WNYC.

[6] In this regard, petitioner relies upon hearsay information alleging that the Chairman of the Site Selection Board stated at the Site Selection Board hearing in October, 1972, that the Board had not approved the Seaview site for the WNYC antenna system. This information represents unacceptable hearsay which does not conform to the requirements of Section 1.229(c) of the Rules.

[7] In support of this contention, petitioner submits the testimony of Mrs. Bokert (who is connected with the PTA of Wagner High School located adjacent to the proposed site), in which she states that Deputy Mayor Morrison explained in a letter addressed to her that the WNYC proposal "was not really predicated upon this particular site"; a statement of Norman Redlich, Corporation Counsel and Counsel to WNYC, to the City's Board of Estimate on April 20, 1972, which includes the following, "Now as to the specific location

representations, petitioner contends, give rise to a serious question whether the licensee "has misrepresented its proposal for the location of its antenna site to the Commission or to any other official governmental agency, body or representative" and an appropriate issue is therefore warranted.[8]

3. The Broadcast Bureau first contends that WCCO's petition is grossly untimely, that good cause for the late filing has not been shown, and consequently, the WCCO has not met the test enunciated in *The Edgefield-Saluda Radio Co., supra.* With respect to the merits of the request for a site availability issue, the Bureau is of the opinion that approval by the Site Selection Board and/or the Board of Estimate is roughly analogous to seeking approval from the local zoning authority and, absent some specific information that either Board has denied WNYC authority to use the property, the request for a site availability issue should be denied, citing *Edward G. Atsinger, III*, 29 FCC 2d 443, 21 RR 2d 1039 (1971). Moreover, giving due consideration to the local opposition to the use of the site, the Bureau contends that the mere fact that difficulty might be encountered in obtaining either Site Selection Board or Board of Estimate approval is not a sufficient basis for enlarging the issues.[9] Similarly, the Bureau believes that there is little basis for questioning whether WNYC has kept the Commission fully informed of significant and material changes in conditions and circumstances relating to the proposed antenna site because WNYC has been and is still actively prosecuting its application for the Seaview site. Finally, the Bureau argues that the allegations relating to statements allegedly made by City officials lack the supporting documentation required by Rule 1.229(c) and, therefore, cannot support the requested enlargement.[10]

4. In its opposition, WNYC first contends that WCCO's petition to enlarge is untimely and without merit. In support of its claim that there is reasonable assurance that the Seaview site is available to it, applicant submits an affidavit of Ira Duchan, Commissioner of Real Estate of the City of New York and Deputy Administrator of the Municipal Service Administration, which attests to the fact that the leases entered into with the Jewish Center and the Hospital Corporation are not irreversible. WNYC also submits an affidavit of Norman Redlich, Corporation Counsel of the City of New York, in which he states that the City has the power to regain those portions of the proposed site leased to the Center and the Hospital Corporation through purchase, condemnation or otherwise whenever required for a public or municipal use or purpose. Additionally, applicant contends that none of the events relied upon by WCCO in its petition are of decisional significance because they would not preclude construction of the pro-

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of the tower in the event we win our proceeding before the FCC, I think as I said, while it is in the Borough of Richmond, the question of specific location is one that will have to await future determination"; and the statement of Mr. Garelik, President of the City Council, which provides in pertinent part, "I was assured by the Administration at that time that this in no way committed the City to any one specific site and that it was a formality needed to prevent the FCC from foreclosing consideration of the application."

[8] In support, WCCO cites *Eastern Broadcasting System, Inc.*, FCC 62–133, 22 RR 961, 962 (1962); *cf. Fine Music, Inc.*, 8 FCC 2d 123, 9 RR 2d 1273 (1967).

[9] Citing *John Hutton Corp.*, 27 FCC 2d 214, 20 RR 2d 1159 (1971); *Lester H. Allen*, 20 FCC 2d 478, 17 RR 2d 914 (1969); and *HGR Broadcasting Co.*, 3 FCC 2d 658, 6 RR 2d 1698 (1966).

[10] In this connection, the Bureau submits the letter sent to Mrs. Bokert from Deputy Mayor Morrison which directly controverts Mrs. Bokert's statement.

posed WNYC facility at that site.[11] Finally, in response to the request for a misrepresentation issue, WNYC asserts that, contrary to WCCO's assertion, the testimony of public witnesses clearly shows the intention of the City to construct on the Seaview site. In this regard, applicant charges that Deputy Mayor Morrison never made the statement attributed to him by Mrs. Bokert, but rather said just the opposite of what Mrs. Bokert claims he said.[12] Furthermore, applicant argues that WCCO's reliance upon the representation by Norman Redlich before the Board of Estimate on April 20, 1972, is likewise without merit to show lack of good faith; as explained by Redlich in an attached affidavit, although he was generally familiar with the facts of the WNYC application at the time he made the statement, he was not apprised of the particular day-to-day developments, and his statement to the Board was simply a reference to the fact that the WNYC transmitter site would have to be approved by the Site Selection Board. Finally, WNYC submits the affidavit of Sheldon Hoffman, Director of the City of New York Municipal Broadcasting System, who attests to WNYC's firm intention to construct the facility at the Seaview site, if the construction permit is granted. In view of the foregoing, the applicant concludes that no misrepresentation by City officials has been or can be shown by WCCO.

5. In reply, WCCO alleges that in view of the leases executed by the City and the Jewish Center and Hospital Corporation, the Center and Hospital—and not the City—have the right to the immediate and future use of the WNYC site. Even assuming the leases may be reversible, petitioner contends that there is no showing that they will be reversed; thus, there is no showing that the City has taken the internal steps necessary which would indicate that it would exercise its alleged power to acquire interests in property by purchase, condemnation or otherwise under these circumstances.[13] In this connection, petitioner alleges that there is a substantial question as to whether the City can condemn the lease to the Jewish Center in view of the express covenant for quiet enjoyment contained in the lease; and in addition, that the only mention in the lease of "condemnation" is in reference to a "body having a power of eniment domain superior to that of the landlord [the City]". Moreover, WCCO notes, the City agreed to subordinate its fee to any leasehold mortgage by the Center. Finally, petitioner notes the heavy financial burdens and protracted length of time which would necessarily be involved in acquiring property by condemnation. Given the above, petitioner contends with respect to the Rule 1.65 issue, that WNYC failed to report matters of "decisional significance" concerning the availability of its site. Finally, with regard to the misrepresentation issue, petitioner asserts that Mr. Radlich's statements before the Board of Estimate had a plain factual meaning beyond legal advice that the Seaview site required Site Selection Board approval; the plain meaning was that though the site would be on Staten

[11] In this connection, WNYC argues that considering the long pendency of this proceeding, interim utilization of this land for public purposes can hardly be deemed unreasonable.
[12] In support thereof, WNYC also attaches a copy of the letter that Deputy Mayor Morrison sent Mrs. Bokert and which formed the basis for Mrs. Bokert's testimony.
[13] WCCO argues that the functions of the Site Selection Board and Board of Estimate may not be characterized as local intra-governmental actions, roughly analogous to local zoning authorities; rather than being quasi-judicial bodies, the two city agencies are legislative and political in character, petitioner asserts.

Island, the specific location was not yet fixed and would "await future determination." [14]

6. It is well established that the Commission will not attempt to prejudge actions pertaining to land planning which are within the jurisdiction of local authorities, absent a showing indicating that the applicant will be unable to obtain approval of proposed site plans from local authorities.[15] Accordingly, but for the leases executed between the City and the Hospital Corporation and the Jewish Community Center, the Board would refrain from adding an issue inquiring into whether WNYC could obtain appropriate City approval for its proposed site. In the Board's view, however, WCCO has raised a substantial question as to whether the City has entered into leasehold agreements which may be impediments to utilization of the proposed site by WNYC.[16] Thus, there is no indication that there is a provision in the Hospital Corporation lease which provides for repossession of the proposed site,[17] or a letter from the Hospital Corporation indicating an intention to discuss the retransfer of the property leased to that organization,[18] or some other indication that the Hospital Corporation would have no objection to restoring possession of the property to the City. Nor is it clear from the pleadings that the City can condemn a portion of the property leased to the Jewish Community Center, especially in view of the provisions of the lease cited by WCCO. Moreover, even assuming there was no question concerning the City's right to condemn property leased to the Center (or to the Hospital Corporation), condemnation necessarily presents problems of time and expense that could very well be pertinent to the availability of the site. Therefore, under the circumstances as presented, we believe that there is sufficient doubt as to whether reasonable assurance exists as to the availability of WNYC's proposed site to warrant enlargement of the issues as requested by the petitioner. In view of this conclusion, WNYC's failure to report the City's alienation of its proposed site warrants addition of a Rule 1.65 issue. Finally, the Board believes that petitioner's allegations are inadequate to support addition of the requested misrepresentation issue. Aside from the fact that WCCO's allegations in this regard do not comport with the provisions of Section 1.229(c) requiring affidavits of a person or persons having personal knowledge of the facts alleged,[19] there is no basis for assuming that the statements made by City officials to which WCCO refers are more than the expression of individual opinion. See *Edward G. Atsinger, III, supra.* Finally, we have no reason to doubt the sworn affidavit of Mr. Redlich explaining what he meant in his statement to the Board of Estimate concerning the proposed site. Therefore, we are unable to

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[14] Petitioner concedes that Mrs. Bokert's testimony was in error in ascribing the Deputy Mayor's reassurance that Seaview would not be used in a *letter* she received from him; however, WCCO attaches to its reply an affidavit by Mrs. Bokert allegedly showing that her understanding was based on a *conference* with the Deputy Mayor.

[15] See *Massillon Broadcasting Co.*, FCC 61–1102, 22 RR 95 (1961); *Eastside Broadcasting Co.*, FCC 63R–528, 1 RR 2d 763 (1963); *El Camino Broadcasting Corp.*, 14 FCC 2d 361, 13 RR 2d 1260 (1968).

[16] *Cf. Marvin C. Hanz*, 21 FCC 2d 420, 18 RR 2d 310 (1970); *Michael S. Rice*, 8 FCC 2d 15, 9 RR 2d 1254 (1967); and *Azalea Corp.*, 38 FCC 2d 95, 25 RR 2d 975 (1972).

[17] See *Seaborn Rudolph Hubbard*, 19 FCC 2d 630, 17 RR 2d 177 (1969).

[18] See *Marvin C. Hanz, supra.*

[19] See *Wilkes County Radio*, 10 FCC 2d 175, 11 RR 2d 341 (1967); *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 21 RR 2d 1147 (1971).

conclude that a serious question has been raised warranting a misrepresentation issue against WNYC.

7. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed January 24, 1973, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

8. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine whether the City of New York Municipal Broadcasting System has reasonable assurance of the availability of its proposed transmitter site.

(b) To determine whether the City of New York Municipal Broadcasting System has kept the Commission fully informed of significant and material changes in conditions and circumstances relating to its proposed antenna site and, if not, the effect thereof on the basic or comparative qualifications of the applicant to be a Commission licensee.

9. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of the evidence and the burden of proof under issue (a) added herein SHALL BE on the City of New York Municipal Broadcasting System; and that the burden of proceeding with the introduction of evidence under issue (b) added herein SHALL BE upon Midwest Radio-Television, Inc., and the burden of proof under issue (b) SHALL BE upon the City of New York Municipal Broadcasting System.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-254

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y. For Special Service Authorization To Operate Additional Hours From 6 a.m., e.s.t., to Sunrise, New York, N.Y., and From Sunset, Minneapolis, Minn.	Docket No. 11227 File No. BSSA-266
CITY OF NEW YORK MUNICIPAL BROADCASTING SYSTEM (WNYC), NEW YORK, N.Y.	Docket No. 17588 File No. BP-16148
MIDWEST RADIO-TELEVISION, INC. (WCCO), MINNEAPOLIS, MINN. For Construction Permits	Docket No. 19403 File No. BP-19151

MEMORANDUM OPINION AND ORDER

(Adopted July 9, 1973; Released July 10, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. The Review Board has before it an appeal, filed on May 10, 1973, by Midwest Radio-Television, Inc. (WCCO)[1] from an order of Administrative Law Judge Basil P. Cooper. In his Order, FCC 73M-464, released April 18, 1973, the Presiding Judge granted a petition for leave to amend WNYC's *Suburban* showing, and accepted certain hearing exhibits under that issue tendered by the City of New York Municipal Broadcasting System (WNYC). The Judge authorized counsel to appeal from his ruling, specifying that such appeal must be filed with the Review Board within 30 days after the release of his Memorandum Opinion and Order. The instant appeal was filed within the 30 days period specified by the Judge.

2. WCCO's appeal will be dismissed. Even if the Presiding Judge erred when he permitted WNYC to amend its application and submit additional exhibits, appellant has not shown that the error is likely to require a remand. Nor are the Judge's gratuitous rulings concerning his definition of the gain area and the participation of NYC officials in the hearing likely to so effect the course of the hearing that remand after the Initial Decision will be necessary. In these circumstances we agree with WNYC and the Broadcast Bureau that orderly disposition of the Commission's business requires us to dismiss the instant appeal.

[1] The Board also has before it an opposition to appeal, filed May 29, 1973, by the Broadcast Bureau; an opposition, filed June 6, 1973 by City of New York Municipal Broadcasting System (WNYC); and a reply to opposition, filed June 18, 1973 by WCCO.

WCCO may if it sees fit again raise its allegation of error in its exceptions to the Initial Decision.[2]

3. ACCORDINGLY, IT IS ORDERED, That the appeal from order of Administrative Law Judge Basil P. Cooper, filed May 10, 1973 by Midwest Radio-Television, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

[2] See Sec. 1.301(b) of the Commission's Rules. *Cf. Communications Satellite Corp.*, FCC 73-658, —— FCC 2d ——, released June 21, 1973.

F.C.C. 73–592

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
COLUMBIA BROADCASTING SYSTEM, INC.
For Extension of Time For Divestment

MAY 31, 1973.

THOMAS N. DOWD, *Esq.*,
Pierson, Ball and Dowd,
1000 Ring Building,
Washington, D.C. 20036

DEAR MR. DOWD: This refers to your letter of May 24, 1973, on behalf of officers and directors of Columbia Broadcasting System, Inc. (CBS), asking for a 60-day extension of the time within which they must divest themselves of their stock holdings in Viacom International, Inc., under the terms of the Commission's 1971 CBS-Viacom decision (*Columbia Pictures Industries, Inc.*, 30 FCC 2d 9, adopted June 3, 1971). In that decision, persons in this category were ordered to divest themselves of their Viacom stock holdings within two years from the release of the decision, or by June 4, 1973. Sixty (60) days from that date would be August 3, 1973. The six individuals involved are Messrs. William S. Paley (Chairman of the Board), John Schneider and Goddard Lieberson, who are CBS officers and directors; Leon Levy, who is a director; and Julius F. Brauner and Clarence H. Hopper, who are officers but not directors. Their Viacom holdings total about 181,000 shares, or roughly 4.5% of outstanding Viacom stock (including 123,244 shares owned by Mr. Paley and 46,956 shares owned by Mr. Levy).

In your letter, it is stated that the additional time is requested in order to permit orderly disposition of the stock with the least impact on its value. You mention the depressed state of the market as of late May 1973, generally and as to Viacom, and you assert that a sale before June 4 could result in an unwarranted loss to these individuals and further depression of Viacom's market value. It is also stated that the two individuals with the largest holdings, Messrs. Paley and Levy are considering the possibility of giving some or all of their holdings to charitable or educational institutions, a process which will take time to explore and, if adopted, to carry out, for the same reasons which are noted in our recent action concerning Dr. Frank Stanton. It is also stated that each of the individuals mentioned commits himself not to exercise any right to vote his Viacom stock during the extension period.

It should be noted that there are not present here the circumstances which we noted in the decision concerning Dr. Stanton, since he changed his relationship with respect to CBS recently, whereas it appears that the six individuals involved here do not contemplate and

have not contemplated any pertinent change in their status, and could have disposed of their stock at any time during the last two years. However, we also recognize the depressed state of the market in recent months and that the forced disposition by early June of a substantial amount of Viacom stock could adversely affect the value of the holdings of others as well as of these individuals. It also appears that a brief extension, for the 60-day period requested, will not substantially interfere with the Commission's regulatory objectives.

However, it also appears that certain conditions should be imposed on this extension. These are: (1) the condition you propose, that the individuals mentioned not exercise any voting rights with respect to their Viacom stock, during the extension period; and (2) that neither they, nor anyone else at CBS, in connection with the consideration of program material for network exhibition, suggest to anyone, directly or indirectly, expressly or by implication, that syndication or other non-network rights to these programs be granted to Viacom International, Inc.

Accordingly, IT IS ORDERED, That, subject to the conditions mentioned in the previous paragraph, the date by which Messrs. William S. Paley, Leon Levy, John Schneider, Goddard Lieberson, Julius F. Brauner and Clarence H. Hopper must divest themselves of their stock holdings in Viacom International, Inc. IS EXTENDED, to and including August 3, 1973.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
JACK BAKER, MINNEAPOLIS, MINN.
Concerning Fairness Doctrine Re Station
KSTP-TV.

JULY 6, 1973.

MR. JACK BAKER,
2929 40th Avenue South,
Minneapolis, Minn. 55406

DEAR MR. BAKER: This is with reference to your May 10, 1973 fairness complaint against KSTP-TV, St. Paul, Minnesota.

You state that during the 5-minute local news segment of the "Today Show" on April 4, 1973, the commentator announced that "arsons had gone up in Minneapolis about 55% and that some 15 fires had been deliberately set by arsonists," and then commented that most arsonists are " 'angry homosexuals' and frustrated married partners." You contend that there is no responsible research that will substantiate his statement and that you have requested the licensee to afford you an opportunity to present contrasting views. In response to a letter from you the licensee stated, on April 11, 1973, that "the reporter based his story and his script on information gained in a recorded interview with the Minneapolis fire department arson chief"; that it knew of "no reason to question the chief's experience and knowledge of his field," and that your request to respond to the remarks was denied.

The selection and presentation of specific program material are responsibilities of the station licensee, and under the provisions of Section 326 of the Communications Act the Commission is specifically prohibited from censoring broadcast material.

However, if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. This policy, known as the fairness doctrine, does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission

will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

Where a fairness complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating a *prima facie* case of violation including: (1) the specific issue of a controversial nature of public importance broadcast; (2) the basis for the claim that the issue was a controversial issue of public importance, either nationally or in the station's local area at the time of the broadcast; and (3) reasonable grounds for the claim that the station broadcast only one side of the issue in its overall programming. See *Allen C. Phelps*, 21 FCC 2d 12 (1969). You have not set forth any basis for your contention that a controversial issue of public importance exists concerning the matter raised in your complaint, or that there was a discussion of a controversial issue of public importance within the meaning of the fairness doctrine.

In view of the foregoing, no further consideration of your complaint is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

ARTHUR L. GINSBURG,
Acting Chief, Complaints and Compliance Division
(*For Chief, Broadcast Bureau*).

F.C.C. 73-684

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JACK O. GROSS, TRADING AS GROSS BROADCASTING CO. (KJOG-TV), SAN DIEGO, CALIF. For Extension of Construction Permit	Docket No. 18377 File No. BMPCT-6661

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 6, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it for consideration: (a) a petition for extraordinary relief, filed December 14, 1972, by United States International University (USIU);[1] (b) an opposition, filed December 26, 1972, by the Broadcast Bureau; and (c) a reply, filed January 8, 1973, by USIU. Also before the Commission are a motion for leave to file a brief *amici curiae* and an accompanying brief *amici curiae*, submitted December 20, 1972, by Congressmen Bob Wilson and Lionel Van Deerlin.

2. This proceeding involves the outstanding construction permit for UHF Station KJOG-TV on Channel 51, San Diego, California. The permit was first granted to Gross on June 23, 1965. The present request for extension of the permit was designated for hearing by our Memorandum Opinion and Order, FCC 68-1099, 15 FCC 2d 76, released November 12, 1968, on issues as to, *inter alia*, whether Gross violated Section 1.65 of our rules, whether he engaged in trafficking with respect to the authorization for Station KJOG-TV, and whether or not his failure to construct the station was due to factors not under his control.

3. In an Initial Decision, FCC 70D-8, 26 FCC 2d 318, released March 2, 1970, the Administrative Law Judge concluded that Gross violated Section 1.65 of the rules by not filing a "letter of intent," dated April 1, 1967, and a draft contract proposing to implement the letter of intent by assigning full and exclusive rights in Gross's permit to USIU. The Judge found that in the late spring and summer of 1967 Gross entered into two separate contracts to assign his construction permit. No conclusion was reached regarding the trafficking issue. De-

[1] Petitioner requests relief from a Supplemental Decision of the Review Board, FCC 72R-126, 34 FCC 2d 780, released May 3, 1972, in which the Review Board denied an application for extension of construction permit filed by Jack O. Gross (Gross), permittee of UHF Station KJOG-TV, San Diego, California, thereby precluding assignment of the permit to USIU. The Commission denied review of the Supplemental Decision without specifying reasons therefor, FCC 72-1000, released November 14, 1972. Both Gross and USIU filed Notices of Appeal. On May 10, 1973, the Court of Appeals, in response to a Commission motion, remanded the proceeding to the Commission for further consideration (*United States International University, et al. v. FCC*, Case No. 72-2179, D.C. Cir., May 10, 1973).

spite the adverse conclusion on the Section 1.65 issue, the Judge concluded that the public interest would be served by a grant of the application for extension of construction permit solely to allow the Commission to process the application for transfer of the permit to USIU.

4. The Review Board, FCC 70R–367, 26 FCC 2d 306, released October 30, 1970, found that Gross's failure to construct the proposed facility was due to causes within his control, and that no other matters present in the record justified a grant of the extension. The Board reversed the Initial Decision and denied Gross's application without reaching the Section 1.65 and trafficking issues. In a petition for reconsideration, USIU informed the Review Board that Gross had offered to make a gift of the permit to USIU and argued that the record justified the grant of Gross's extension request. In a Memorandum Opinion and Order, FCC 71R–73, 27 FCC 2d 957, released March 4, 1971, the Review Board held that while the circumstances would not permit an outright grant of the extension to Gross, a grant solely in order to process the assignment application was justified. The Board noted in particular USIU's firm commitment to proceed with construction of the station and Gross's waiver of reimbursement for his expenses, USIU's equities in the permit, and the Commission's policy favoring development of UHF service. The Board still did not resolve the Section 1.65 and trafficking issues. On review we held that Gross's construction permit could not be extended without resolution of the Section 1.65 and trafficking issues. We therefore remanded to the Board for consideration of these issues, FCC 71–841, 31 FCC 2d 226, released August 25, 1971.

5. After further consideration, the Review Board issued a Supplemental Decision, FCC 72R–126, 34 FCC 2d 780, released May 3, 1972, in which it found that Gross violated Section 1.65 by failing to inform the Commission of the April 1, 1967, "letter of intent" and subsequent draft contract for assignment of the KJOG–TV construction permit to USIU. Although the Board found that Gross had not engaged in trafficking, it found that the violations of Section 1.65 rendered him unqualified to be a Commission licensee and denied the extension. We denied review without opinion, FCC 72–1000, released November 14, 1972.

6. USIU then filed the petition for extraordinary relief now under consideration. USIU asks that we vacate our order denying review of the Review Board Supplemental Decision, grant the applications for review denied in our November 1972, order, and consolidate for consideration the extension and assignment applications. It argues that an extension of Gross's permit is justified by its equities in the permit, the unique and meritorious programming which it proposes, and the public interest in having Channel 51, San Diego, activated as soon as possible. USIU also asserts that Gross's absolute disqualification because of a technical violation of Section 1.65 of the rules is contrary to Commission precedent. Congressmen Wilson and Van Deerlin, in their brief *amici curiae*, support USIU's petition and request approval of the assignment application.

7. We concur in the findings of the Board that Gross violated Section 1.65 of the rules. We do not believe, however, that the violations were of such a serious nature as to require Gross's absolute disqualifica-

tion. While we do not condone the violations, there are no facts in the record which would indicate the existence of fraud, concealment or other serious misconduct which would warrant absolute disqualification. See *A–C Broadcasters*, 10 FCC 2d 256 (1967); *Kittyhawk Broadcasting Corp.*, 17 FCC 2d 602 (1969); and *J.J.C. Broadcasting Corp.*, 35 FCC 2d 544 (1972).

8. While Gross is not disqualified as a permittee, it must be acknowledged that this is the third extension of construction permit for which Gross has applied, and that he clearly abandoned any intention of constructing the station. Nevertheless, we believe that the public interest, convenience and necessity will be served by a grant of the extension solely to allow consideration of the application for consent to assign the permit to USIU. USIU has at all times been prepared to proceed with construction of the station. USIU was not involved in Gross's violation of the rules, Gross will not profit from the violations, and it appears that the grant, and the assignment if approved, will result in the more expeditious inauguration of a viable new UHF television service in the San Diego area. *The Jackson Television Corp.*, 24 FCC 2d (1970).

9. Since we are granting Gross's application for an extension of his permit, consolidation with the request for consent to assign Gross's permit to USIU is unnecessary. The motion for leave to file brief *amici curiae* will be granted, and the brief will be considered in conjunction with the proposed assignment.

10. Accordingly, IT IS ORDERED, That the petition for extraordinary relief, filed December 14, 1972, by United States International University, IS GRANTED to the extent indicated herein, and IS DISMISSED in all other respects; and

11. IT IS FURTHER ORDERED, That our Order, FCC 72–1000, released November 14, 1972, IS VACATED, and the applications for Review filed on June 2, 1972, by Jack O. Gross, tr/as Gross Broadcasting Company (KJOG–TV), and by United States International University ARE GRANTED; and

12. IT IS FURTHER ORDERED, That the application for extension of construction permit filed by Jack O. Gross, tr/as Gross Broadcasting Company (KJOG–TV) (BMPTC–6661), IS GRANTED, for the sole purpose of allowing the Commission to consider the pending application for assignment of the permit to United States International University; and

13. IT IS FURTHER ORDERED, That the motion for leave to file brief *amici curiae*, filed December 20, 1972, by Congressmen Wilson and Van Deerlin, IS GRANTED; and

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER H. REX LEE

I dissent to the majority's grant of Gross Broadcasting Company's application for extension of time within which to construct Station KJOG–TV, Channel 51, San Diego, California, for the purpose of per-

mitting Commission consideration of a pending application for assignment of the station permit to United States International University (USIU).

Some historical perspective is necessary for an understanding of my position. In 1964, Gross applied for the Channel 51 construction permit, and that application was subsequently designated for comparative hearing with the mutually exclusive application of California Western University (now USIU). Prior to the hearing, Gross and USIU entered into an agreement which provided for the dismissal of USIU's application and for the creation of an option in USIU to acquire a 50% interest in the new station. The Review Board approved the agreement on June 23, 1965, and granted the Gross application. On January 19, 1966, Gross requested an extension of time to complete construction, stating that antenna site problems had caused a delay in station activation. The request was granted on March 4, 1966. On August 2, 1966, Gross applied for a modification of his construction permit and for an additional extension of time, reaffirming his intention to construction the station. However, since the extension request was improperly filed, the construction permit for Channel 51 expired. Gross then filed an application for a new permit, which was granted on January 5, 1967.

On October 31, 1967, USIU submitted an application for assignment of the construction permit to USIU, accompanied by a "letter of intent", dated April 1, 1967, which indicated Gross's intention to transfer full and exclusive rights to his permit to USIU. The agreement was contingent upon a grant of extension of time within which to construct, and it provided that USIU would reimburse Gross for his expenses up to the time of transfer. On November 3, 1967, Gross filed the extension application now under consideration and reported his intention to transfer his permit to a new corporation to be formed by Broadmoor Broadcasting Corporation. Under the agreement with Broadmoor, Gross was to be reimbursed for his actual expenses and the new corporation agreed to honor USIU's rights under the original Gross-USIU contract. USIU filed a legal action in the California Superior Court to determine the validity of the April 1, 1967, "letter of intent", and the court found that the "letter of intent" was a binding contract pursuant to which USIU was entitled to specific performance. Thereafter, Gross and Broadmoor sought dismissal of their assignment application, and on October 6, 1969, an application was filed for approval of the assignment of Gross's permit to USIU.

In the meantime, on November 12, 1968, the Commission designated the extension application of November 3, 1967, for hearing on issues to determine whether Gross violated the provisions of Rule 1.65 [1] or engaged in trafficking in the KJOG–TV authorization; whether the failure to construct the station was due to causes not under the control of Gross; and whether there are "other matters" sufficient to justify

[1] Rule 1.65 imposes an obligation on an applicant for the continuing accuracy and completeness of information furnished in a pending application or in proceedings involving a pending application. In order to implement that obligation, the rule requires an amendment to the application or the submission of a statement within 30 days whenever information furnished in the application is no longer substantially accurate and complete or whenever there has been a change as to any other matter which may be of decisional significance in a proceeding involving a pending application. See *Report and Order in Docket No. 14867*, FCC 64–1037, 3 RR 2d 1622.

a further extension of time to construct KJOG–TV. In his Initial Decision in the proceeding (26 FCC 2d 318, released March 2, 1970), the Administrative Law Judge concluded that Gross had violated Rule 1.65 for his failure to file the April 1, 1967, "letter of intent" and a draft contract, which proposed to implement the former by assigning full and exclusive rights in Gross's permit to USIU. Despite the adverse conclusion on the Rule 1.65 issue and the further determination that the failure to construct KJOG–TV could be attributed to matters entirely within Gross's control, the Judge held that the public interest would be served by grant of the extension application solely to allow the Commission to process the USIU assignment application. No final determination was made by the Judge with respect to the trafficking issue.

The Review Board acted on the Gross application on three separate occasions. In its first Decision (26 FCC 2d 306, released October 30, 1970), the Board concluded that Gross's failure to construct the station was due to causes within his control and that no "other matters" in the record justified a further extension. The Board, thereupon, reversed the Initial Decision and denied the Gross application without reaching the Rule 1.65 and trafficking issues. On the basis of a petition, filed by USIU, the Board reconsidered its first Decision and held that "other matters" justified grant of the extension application solely to permit the processing of the USIU assignment application. In this regard, the Board specifically noted USIU's firm commitment to construct the station, Gross's waiver of reimbursement for his expenses, USIU's equities in the Channel 51 permit, and the Commission's policy favoring UHF television development. In a dissenting statement, Board Member Pincock argued that grant of the extension application was not proper since the Board had not resolved the outstanding character qualification issues against Gross, *i.e.*, Rule 1.65 and trafficking. On review, the Commission held that the Channel 51 permit could not be extended without resolution of the Rule 1.65 and trafficking issues and that a remand to the Board for consideration of those issues was necessary. See 31 FCC 2d 226, released August 25, 1971. On remand, the Board issued a Supplemental Decision (34 FCC 2d 780, released May 3, 1972), in which it resolved the trafficking issue in Gross's favor, but held that his failure to inform the Commission of the April 1, 1967, "letter of intent" and the subsequent draft agreement with USIU amounted to a *disqualifying* violation of Rule 1.65.[2] The Commission, with Commissioners Robert E. Lee, Reid and Hooks dissenting, denied review of the Board's Supplemental Decision without opinion.

USIU then filed a petition for extraordinary relief on December 14, 1972, requesting the Commission to vacate its order denying review of the Review Board's Supplemental Decision and to consolidate for consideration the extension and assignment applications. In its petition, USIU argues that an extension of Gross's permit is warranted on the basis of USIU's equities, the unique and meritorious programming which it proposes and the early activation of Channel 51, and

[2] Board Member Kessler dissented on the grounds that Gross's Rule 1.65 violation was not so serious as to warrant disqualification and that disqualification, in any event, is inconsistent with past Commission precedent.

that the Board's disqualification of Gross under the Rule 1.65 issue is contrary to precedent. However, USIU declines to argue the legal sufficiency of the Board's Decision, which it states will be resolved by the Court of Appeals since both Gross and USIU have filed notices of appeal. On May 10, 1973, the Court, in response to a Commission motion, remanded the proceeding to the Commission for further consideration. In this posture, the majority now decides to grant USIU's petition for extraordinary relief, to vacate the order (FCC 72–1000, released November 14, 1972) denying review of the Review Board's Supplemental Decision and to extend Gross's construction permit to enable the Commission to consider the pending USIU assignment application. Even though the majority concurs in the Board's finding that Gross violated Rule 1.65, it does not agree that such a violation, in the absence of some evidence of fraud, concealment or other serious misconduct, warrants absolute disqualification of Gross as a permittee. Also, the majority concedes that Gross clearly abandoned any intention to construct the station, but that an extension of the permit is justified to permit consideration of the USIU assignment application. In this regard, the majority points out that USIU was not involved in Gross's rule violation, that Gross will not profit from the violation and that the early initiation of a new UHF service in San Diego is in the public interest.

I cannot agree with the majority's position. For one thing, USIU's petition for extraordinary relief is in reality a request for reconsideration of the Commission's denial of a Gross-USIU application for review without opinion. Rule 1.106(b) bars petitions for reconsideration of such Commission actions, and, therefore, the petition, which raises no new matters, should be dismissed. Moreover, I see no reason to reconsider the Board's Supplemental Decision, which denied the extension application. As the Board found at paragraph 4: the April 1, 1967, "letter of intent" represented Gross's attempt to dispose of his construction permit for a station he had led the Commission to believe he fully intended to construct and operate himself; at the time of the execution of the letter, Gross had a modification application pending before the Commission, but he failed to report the "letter of intent", which, as the California state court subsequently adjudicated, was a firm offer timely accepted by USIU and was "decisionally significant" within the meaning of Rule 1.65; the violation was repeated when Gross failed to report the subsequent draft contract designed to implement the terms of the letter; and Gross's reliance on advice of counsel to insulate his non-disclosure cannot be accepted. Therefore, the Board's conclusion that Gross does not possess the requisite qualifications to be a broadcast licensee is amply supported by the evidence of record and is justified by Commission precedent. See *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1001, 18 RR 2d 125 (1969), review denied FCC 70–891, released August 26, 1970; *Voice of Reason, Inc.*, 37 FCC 2d 686, 25 RR 2d 645 (1972), reconsideration denied 39 FCC 2d 847, 26 RR 2d 1092 (1973). The majority's attempt to mitigate the impact of Gross's derelictions is clearly inconsistent with the Board's findings and with the obligations imposed on applicants, permittees and licensees to comply with administrative regulations and to be candid with the Commission. Nor do I necessarily accept the ma-

jority's assertion that Rule 1.65 violations cannot form the basis for a permittee's disqualification in the absence of some evidence of fraud, concealment or other serious misconduct.

Even if I agreed with the majority's disposition of the Rule 1.65 issue, I would not grant the extension application. The Board's Supplemental Decision in this proceeding incorporated its earlier findings that Gross's failure to construct KJOG–TV was due to matters entirely within his control and that there were no other reasons to justify a further extension of the Channel 51 permit. See 34 FCC 2d at 781; 26 FCC 2d at 310–312. While the majority concedes that Gross abandoned any intention of constructing the station, it nevertheless grants a further extension to permit consideration of the USIU assignment application, based on the following factors: (1) USIU was not involved in Gross's rule violations and is prepared to construct the station; (2) Gross will not profit from the assignment; and (3) activation of a new UHF service in San Diego is in the public interest. I reject any attempt to credit USIU's claimed "equities"—even though it had been given an option to purchase a 50% interest in KJOG–TV in 1965, there is no indication of any affirmative actions by USIU to activate the San Diego facility. Moreover, a conditional grant here would not result in the inauguration of a new UHF service in a previously underserved area, as was the case in *The Jackson Television Corporation*, 24 FCC 2d 439 (1970). San Diego is presently served by four television stations, including two UHF stations. Finally, it must be noted that Gross's proposal to forego compensation for expenses incurred in pursuing the Channel 51 permit was not offered until after the Board had entered its 1970 Decision, which denied his extension request. Therefore, the majority's rationale for even a conditional grant finds little support in the record and in prior precedent.

For these reasons, I cannot accept the majority's implicit holding that since Gross is willing to assign his authorization to USIU without compensation, his interest in the Channel 51 permit is effectively cancelled and the public interest is served thereby. I am prepared to support the Board's decisions in this proceeding (and, as a result, I dissented to the decision to seek remand from the Court of Appeals) and to reinstate the availability of the Channel 51 allocation. Gross's authorization has been outstanding since 1965, and yet the station has not been constructed. I think the public interest is better served in such circumstances by permitting other interested parties to apply for the channel and to render a new UHF service in the San Diego area.

I dissent.

F.C.C. 73-735

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 1.574 AND PART 73, SUBPART F, OF THE COMMISSION'S RULES AND REGULATIONS RELATING TO INTERNATIONAL BROADCASTING STATIONS	Docket No. 19530

REPORT AND ORDER

(Adopted July 3, 1973; Released July 11, 1973)

BY THE COMMISSION:

1. On June 27, 1972, the Commission released a Notice of Proposed Rule Making in the above-entitled proceeding (FCC 72-540, 37 Fed. Reg. 12969) in which it proposed broad revisions of its rules which govern international broadcasting. Comments and reply comments having been duly filed, the matter is ready for decision.[1]

INTRODUCTION

2. In addition to licensing and regulating domestic broadcasting stations (AM, FM, TV), the Commission also licenses and regulates international broadcasting stations located in the United States. Whereas the signals of the former are intended to be received by the public in this country, those of the latter are intended to be received directly by the general public in foreign countries. The Voice of America (VOA) also operates international broadcasting stations in this country but, as is the case with other governmental radio operations, they are neither licensed nor regulated by the Commission.[2]

3. International broadcasting stations, both those of Commission licensees and those of the VOA, operate in seven bands between 5,950 kHz and 26,100 kHz. These bands, which are allocated to the broadcasting service by the Radio Regulations annexed to the International Telecommunications Convention (Montreux 1965), are also used by other countries throughout the world for international broad-

[1] Comments were filed by the three stations presently authorized by the Commission to engage in international broadcasting, by potential licensees for such operations, by the Voice of America, and by others, as follows: Paul R. Bartlett; Family Stations, Inc., and Radio New York Worldwide, Inc. (jointly); Far East Broadcasting Company, Inc.; Billy Graham Evangelistic Association; Clarence C. Moore; E. H. Munn, Jr.; Lowell Perry; Robert W. Seaburg; Trans World Radio and Trans World Radio Pacific; World International Broadcasters, Inc.; and World Radio Missionary Fellowship, Inc. Reply comments were filed by Family Stations, Inc., and Radio New York Worldwide, Inc. (jointly), and Far East Broadcasting Company, Inc.

[2] Since international broadcasting stations licensed by the Commission are operated by private parties, their service is sometimes referred to as private international broadcasting to distinguish it from international broadcasting of the VOA. The service of either is often called short-wave or high-frequency broadcasting.

casting. The propagation characteristics of frequencies in these bands vary greatly with the time of day, season of the year, and the sunspot number. Because of this, unlike licenses of domestic broadcasting stations which always specify the frequency or channel of operation of the station, licenses of international broadcasting stations specify no frequency. Instead, four times each year, as the seasons change, the Commission assigns each licensee specified frequencies to be used by it (using directional arrays) for transmission of signals to specified areas of the world during specified times of the day. These assignments of frequencies are called seasonal schedules. When a seasonal schedule is issued, it becomes an attachment to the license, replacing the preceding schedule.[3]

4. The rule revisions proposed in the Notice covered a variety of matters: (1) placing a ceiling on frequency usage by private international broadcasters; (2) conforming seasonal schedule application procedures to those required by international agreement; (3) amending the technical requirements concerning station operation; and (4) other topics, *e.g.*, proposing that fees be charged in connection with the processing of applications for seasonal schedules, changing the length of license period, and inquiring whether common ownership of more than one international broadcast station should be permitted.

FREQUENCY USAGE

5. The Notice pointed out that between the years of 1950 and 1970 the number of short-wave transmitters in the international broadcasting service throughout the world more than tripled and the number of frequency-hours used daily by international broadcasters in the entire world increased from 4,000 to 10,000. This increase has made it more and more difficult for international broadcasters to obtain frequencies that will provide satisfactory service. The Notice also mentioned that VOA frequency-hour usage had increased over the years and that it had averaged 440 frequency-hours per day for the previous five years for its transmitters located in the continental United States. On the other hand, it stated, private international broadcasters licensed by the Commission had been using about 75 frequency-hours per day in recent years and only 45 in the previous two years. It noted that while increased budgets of VOA demonstrate Congressional support of the proliferating VOA broadcast activities, the Smith-Mundt Act [4] (which expresses the policy that the government shall not have a monopoly of international broadcasting) shows Congressional approval of private international broadcasting as well.

The frequency usage proposal

6. Taking into account existing and anticipated frequency congestion throughout the world, existing and anticipated VOA usage, and the policy contained in the Smith-Mundt Act, we proposed to amend

[3] A seasonal schedule is the same for each day of the season. For example, it may authorize a station to broadcast each day of the coming season on frequency A to area X between 1 and 3 p.m.; on frequency B to area X between 3 and 5 p.m.; on frequency C to area Y between 5 and 7 p.m.; and on frequency D to area Z between 7 and 8:30 p.m. A frequency used for one hour is called a frequency-hour. In the foregoing example, the station would be using 7½ frequency-hours per day.

[4] United States Information and Educational Exchange Act of 1948, 62 Stat. 6, codified in scattered sections of 22 U.S.C. (1964).

our rules to provide that private international broadcasters as a group could use not more than 100 frequency-hours per day. This, we believed, represented a reasonable balance of the pertinent factors bearing on the matter of frequency usage. It was a ceiling that appeared both to allow for some growth of private international broadcasting and to be reasonably related to existing and expected frequency usage.

7. Although we do not here repeat all the details of the proposal, essentially it provided the following: (1) the Commission would not license more than a total of 10 operating main transmitters for all international broadcasting stations; (2) each licensee would be entitled to 10 frequency-hours per day for each such transmitter it was licensed to operate; (3) if the total number of frequency-hours requested by all licensees was less than 100 per day, the request of each licensee would be granted (even if more than 10 frequency-hours per transmitter were requested), but if the total exceeded 100, the frequency-hours would be divided in proportion to the number of transmitters each licensee had. Under the proposed rule, each licensee had the responsibility of making all technical studies to show that frequency-hours requested by it were available and suitable for use as proposed.

8. Comments on the proposal vary from those of VOA which feels that the 100-frequency-hour proposal is not stringent enough, to those of parties who believe that there should be no limitations whatsoever on frequency-hour usage by private international broadcasters so long as licensees can demonstrate that the frequencies they request each season are available and suitable. Between these extremes are comments which suggest that there be no ceiling on frequency-hour usage by Commission licensees for a specified period, *e.g.*, 3 years or 5 years, and that the Commission then review the matter in the light of experience as to actual demand for frequency-hours by private international broadcasters. Also lying between the extremes are comments which concede implicitly or explicitly that there may be a need for a ceiling but that the one proposed by the Commission is too low.

Arguments against the proposal

9. A composite of some of the principal points made by opponents of the proposal follows. Article 10 of the Radio Regulations annexed to the International Telecommunications Convention (Montreux, 1965), which has been ratified by the United States, contemplates coordination between countries as to their frequency-hour usage, and an amicable working out of their differences on the basis of past usage, need, and availability of frequencies. The radio regulations set no limit on frequency-hour usage by international broadcasters. Establishing a ceiling will not help to relieve frequency congestion because the frequencies that Commission licensees are not allowed to use will be allocated to other users at coordinating conferences. Availability of frequencies (which depends on many variables such as time of operation, target area, sunspot number) should be the governing standard rather than an artificial limitation which has little or no relation to the frequencies available to a U.S. international broadcaster. Such an approach would be self-policing because licensees would not wish to spend money to broadcast over frequencies unless they believed that they had selected frequencies over which the programming would get through

to the target area. If the United States unilaterally restricts its frequency usage, it will be the only nation that does so, and for no compelling reason. Moreover, having a fixed ceiling deprives private international broadcasters of the use of additional frequencies that become available during periods of increased sunspot activity.

10. Present private international broadcasting from the United States is done mostly from the east coast. Many important areas of the world, such as Australia, China, New Zealand, Indonesia, Japan, Micronesia, Russia, and Southeast Asia do not presently receive service from Commission licensees. If the proposed ceiling of 100 frequency-hours is adopted, provision should be made to "stretch" it if a showing is made that a presently unserved area is proposed to be served. Or, the ceiling provisions should not apply to proposals for international broadcasting stations in states or territories outside the continental forty-eight states which intend to provide service to target areas not served by private international broadcasters. In other words, the usage of frequency-hours should be based not only on availability of frequencies, as mentioned above, but also on need for service.

11. The Smith-Mundt Act, as modified by Reorganization Plan No. 8 of 1953,[5] provides that the Director of the USIA shall reduce government information activities whenever corresponding private information dissemination is found to be adequate, and that nothing in the Act shall be construed to give the USIA (of which the VOA is a branch) a monopoly in the production or sponsorship on the air of short-wave broadcasting programs. To set a ceiling on private international broadcasters that would give them less than one-fifth of the frequency-hours used by the U.S.-based stations of VOA borders on being contrary to this mandate.

12. A credibility gap attaches to governmental broadcasting. Broadcasting by private stations is often more effective because it has a greater credibility. Having no ceiling on frequency-hours usage will promote more private international broadcasting and thus give a greater quantity of credible programming to target areas abroad. Moreover, the increase in number of private international broadcasting stations will make for competition among them and result in their providing a better service.

13. If a ceiling is adopted, it should be higher than that proposed so that it can accommodate anticipated private international broadcasting. Thus, it should, for example, be 120 to 150 frequency-hours and 12 to 15 transmitters; or, it should be half the number of frequency-hours used by VOA and half the number of their transmitters; or, perhaps 15 frequency-hours for 1 transmitter, 20 for 2, 25 for 3 or more; or, a maximum number of frequency-hours without regard to number of transmitters; or 100 frequency-hours with a 10% increase each year and no limit on the number of transmitters.

Decision as to frequency usage

14. In its comments VOA states that while it would have preferred having a rule that restricted Commission licensees to having not more than three frequencies assigned simultaneously in any single band, it views our proposal for 100 frequency-hours as sufficiently limiting the

[5] 67 Stat. 642, 22 U.S.C. § 1461 (1964).

impact of additional stations in broadcast bands that were already saturated. We believe that limiting private international broadcasters as a group to only three frequencies in a band would be far too severe a restraint. Not only would this generally lessen the ability of licensees to find adequate frequencies, but during periods of low sunspot number when usable frequencies are concentrated more and more in the lower regions of the spectrum it would mean that it might at times be almost impossible for them to satisfy their frequency needs.

15. On the other hand, we continue in the view that establishing some sort of ceiling represents a reasonable balance of present and anticipated frequency congestion in the entire world, existing and anticipated VOA usage, and the policy enunciated in the Smith-Mundt Act. Accordingly, we adopt a ceiling in this proceeding, but the rule imposing that ceiling differs from that which we proposed in the Notice.

16. The rule adopted today provides a limit of 100 frequency-hours per day for all private international broadcasters as a group. However, whereas the proposal provided that each licensee would be entitled to 10 frequency-hours per day for each operating main transmitter that it had, the rule adopted is in no way tied to the number of transmitters. Moreover, although under the proposal the Commission would not have licensed more than a total of ten operating main transmitters for all private international broadcasting stations, the rule adopted has no limit whatsoever on the total number of transmitters that will be licensed, and issuance of authorizations for them will be dealt with on a case-by-case basis. The number of frequency-hours allocated to any licensee will depend on past usage, availability, and need. In other words, at the Commission level we shall have, in a sense, a microcosm of the Article 10 approach;[6] yet the existence of a ceiling will serve as a warning that authorizations for frequency-hours are not available without limit. Under the rule adopted (as was the case under the rule proposed in the Notice), each licensee will have the responsibility of making all technical studies to show that the frequency-hours requested by it are available and suitable for the use proposed.

17. The rule, although providing a ceiling of 100 frequency-hours per day for all licensees as a group, also contains a provision that permits exceeding the ceiling under certain circumstances. It does this by providing that if for a forthcoming season the total of the requests for daily frequency-hours of all licensees exceeds 100, each licensee upon making an adequate showing that good cause exists for not having its request reduced may be authorized the frequency-hours requested. This type of rule is like others which have been established in different contexts and which have proved helpful in dealing with special types of problems.[7]

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[6] As proposed in the Notice, we are deleting present § 73.702 which provides for resolution of conflicting requests for frequency-hours by designating them for hearing because the normal delays in the hearing process prevent it from dovetailing with the coordination process contemplated by Article 10. Hearings are also similarly inappropriate for the Commission level activities in microcosm.

[7] An example of such a rule is § 73.613 which provides that the main studio location of a television broadcasting station shall be located in the principal community to be served. However, the rule also provides that if an adequate showing is made that good cause exists for locating a main studio outside the principal community to be served and that to do so would be consistent with the operation of the station in the public interest, the Commission will permit the studio to be located elsewhere.

18. This rule will allow for a reasonable amount of growth and expansion of the private international broadcast service before frequency-hour usage by all licensees as a group (presently 45 frequency-hours per day) reaches the 100 frequency-hour ceiling, and conceivably for some thereafter. Nor does it seem unduly restrictive, for as one commenting party puts it, realistically there are only about a half dozen existing and potential licensees. As another party states, we may not expect a great rush into international broadcasting since it is not a financially remunerative activity.

19. We believe this rule to be a compromise between the rule that was proposed in the Notice and the various proposals made in the comments. The decision here has not been easy. On the one hand, we cannot shut our eyes to the policy of Smith-Mundt. But on the other hand, it appears the Congress does support an active VOA program and may be expected to continue doing so. We believe it fruitless to debate whether VOA's having four-fifths of the frequency-hours constitutes a monopoly, or whether private broadcasting is more credible than governmental. The accommodation which we have arrived at appears to us a reasonable one.

SEASONAL SCHEDULE APPLICATION PROCEDURES

20. The proposed rule amendments to bring seasonal schedule processing procedures into line with Article 10 requirements (paras. 7–8, 21–22 of the Notice) met with no opposition; nor was any expected. Accordingly, no discussion of these amendments is deemed necessary here. Several helpful suggestions were submitted and are incorporated in the rules adopted today. One, for example, points out that the proposed processing procedures contain no provision for making frequency changes after the start of a season, and suggests that although the present rules contain no such provision, it might be helpful to insert in the new rules language to govern situations of this kind. In support of the suggestion it is stated that often it is necessary to make frequency changes in mid-season because propagation conditions do not always turn out to be as expected. Moreover, on occasion unanticipated interference problems arise and a move to another frequency becomes necessary in order to increase effectiveness. The suggested language to cover this problem, made by the commenting party, is as follows and will be adopted:

> If after the start of a season the licensee submits a request for changes in the manner of operation as authorized, the request will be considered only if accompanied by statements showing good cause therefor, and will be honored only if conditions permit.

TECHNICAL STANDARDS

21. The proposed technical revisions in the Notice cover a variety of matters. Since some of the proposals met with no opposition, no discussion of them is deemed necessary and they are adopted as proposed. Others, however, require discussion and are treated below.

Spurious Emission

22. One party opposes the adoption of proposed section 73.756(b)(1) which reads as follows:

Any emission appearing on a frequency removed from the carrier frequency by between 5 kHz and 10 kHz, inclusive, shall be attenuated at least 25 decibels below the level of the unmodulated carrier.

Its contention is that for the audio to be down 25 decibels at 5 kHz from the carrier frequency, the process would have to begin at below 4 kHz and would eliminate valuable presence of voice frequencies, thereby hindering the effectiveness and intelligibility of signals to listening areas. Therefore, this party recommends, in the interest of fidelity of transmitted signals, the reference to "between 5 kHz and 10 kHz" should be changed to read "between 6.5 kHz and 10 kHz."

23. As reflected in our proposed rules, normally our approach is to consider that the highest significant frequency in the modulating signal would be 5 kHz. However, as indicated in the comments to the Notice and by Report 297–2 of the International Radio Consultative Committee (CCIR), it is frequently the practice in international broadcasting to process the modulation signal by some form of pre-distortion which emphasizes the higher audio components to add "presence" to that signal and to increase its ability to overcome interference. Accordingly, we are being guided by this factor and are modifying our proposed rule to provide that sideband emissions extending between 6.4 kHz and 10 kHz each side of the carrier frequency must be at least 25 db below the output power of the transmitter. This is in line with the practice reported by the CCIR and responds essentially to the recommendation submitted. It should be noted that this limitation refers to the power at spurious side frequencies under conditions of operation. It is not a specification of transmitter response.

Modulation and Bandwidth

24. Proposed Section 73.766 specifies that percentage of modulation shall in no case exceed 100 percent on positive or negative peaks of frequency recurrence. One party suggests that this be changed to provide that in no case shall the percentage of modulation exceed 125 percent on positive peaks of frequent recurrence, or 100 percent on negative peaks of frequent recurrence. It urges that "this change would simply bring the rules into conformance with the standard broadcast rules."

25. It should be noted that in stipulating both positive and negative peaks be held within a 100 percent ceiling, the proposed rule only particularizes the intent of the existing rule, which, in effect, requires that peaks of frequent recurrence (regardless of polarity) not exceed 100 percent. Hence, no change in the existing mode of station operation in this respect is contemplated.

26. The situation existing in the standard broadcast band before the recent amendment of § 73.55 was quite different. Prior to its amendment, § 73.55 placed no limit on the positive degree of modulation, and advantage was being taken of this omission by many stations in employing asymmetrical techniques to produce extremely high levels of positive modulation, with attendant distortion and the potentiality for increased co-channel and adjacent channel interference to other stations. The principal reason for amending § 73.55 was to limit these abuses by placing a ceiling on positive modulation peaks. The ceiling was set at 125 percent (this is an absolute ceiling, not for "peaks

of frequent recurrence" as the commenting party would interpret it) rather than at 100 percent as a compromise measure in the light of evidence that very many standard broadcast stations presently utilize moderate degrees of asymmetrical modulation with some benefit, and a finding that the adverse effects resulting from modulation not exceeding a 125 percent positive ceiling were not so severe as to warrant a disruption of widely employed and accepted operating practices.

27. International broadcast stations have operated subject to the 100 percent positive modulation limit for many years, and the kind of accommodation adopted in view of the existing situation in the standard broadcast service is neither necessary nor desirable for international broadcasting. Accordingly, we shall not adopt the change in § 73.766 suggested above.

Field strength in zone or area of reception

28. The Notice (para. 24) invited comments on whether the present requirement of a minimum permissible median field strength to be delivered to desired target areas by private international broadcasting stations (43.5 decibels above one uv/m (dBu), either measured or calculated) should be deleted or modified, and reasons therefor. One party, the VOA, contends that the signal strength of 43.5 dBu was never viewed as a standard for satisfactory service, since at the Mexico City Conference (1949) it was considered as the minimum signal which would be afforded protection.[8] Therefore, the VOA strongly recommends that this provision be changed to require a delivered median strength of at least 54 dBu in designated reception areas which is the same level of signal intensity required for rural secondary skywave coverage of a standard broadcasting (medium wave) station licensed by this agency.

29. Two parties, filing jointly, express the view that the 54 dBu requirement recommended by the VOA is excessive and unrealistic since it implies that the same standards should be set for both medium and short-wave propagation predictions. These parties contend that the two media are significantly different—propagation characteristics are different, receiver capabilities are different, and distances to reception areas are different. They state that during daytime hours, medium-wave propagation is limited to the ground wave, and usable signals are generally limited to less than 100 miles for transmitter powers of 50 kilowatts and below. They also say that during the nighttime hours, the secondary skywave coverage on medium wave for the same power is of the order of several hundred miles, and propagation is via the lower regions of the ionosphere, whereas short-wave propagation is via the ionosphere both day and night, and is generally intended for areas thousands of miles away. It is further contended that perhaps the major propagation difference between medium and short

[8] This recommendation was adopted at the Mexico City Conference (1949). However, the United States did not sign the Mexico City Agreement, primarily because of a decision that the plan therein did not satisfactorily meet the frequency-hour requirements of this country as compared with other countries. This recommendation of the Mexico City Conference has since been superseded by International Frequency Registration Board (IFRB) Technical Standards, Series A (and amendments thereto). These standards specify minimum field strengths to be protected for various radio services (including HF broadcasting) and the values vary considerably depending upon the type of transmission, frequency, season, time of day, and noise figures according to the location of receiving points.

wave involves atmospheric noise levels, which are considerably higher on medium wave than on short wave. Since a satisfactory signal is one that is high enough above the noise to be heard, it is their contention that it follows that higher signal levels are required on medium wave to produce a signal that is the same level above the noise as on short wave. We are in essential agreement with the argument of these parties and do not adopt the VOA proposal.

30. In contrast to the VOA proposal, all other parties commenting on the question of whether the 43.5 dBu standard should be deleted or modified favor deletion. Most of these parties state that experience shows that even though there are periods of time when the calculated value of median field strength falls somewhat below the value now specified in our rule, such operations are capable of rendering satisfactory service to substantial portions of desired areas of reception. They point out that the private international broadcaster is motivated to have its programming received because the possibility of non-reception wastes operational costs. If the programming is not received at the intended zone or area of reception, they say, the loss is borne by the broadcaster; moreover, if the signal does not arrive, it does not create interference. Two commenting parties state that over the past ten years participants in the co-ordinating procedures have learned that assignments which appear impossible on paper often work out in practice. They also state that at the present time there is no completely satisfactory method of predicting delivered field strength.

31. It appears that the technical standards adopted by the IFRB for short-wave service have been overlooked by the commenting parties. The IFRB has adopted specific minimum field strengths to be protected for this service as specified in IFRB Technical Standards, Series A (and amendments thereto) for application in their technical examinations of notified assignments. These values are stated to have been derived from pertinent recommendations of various reports of the CCIR. Therefore, consistent with our announced intention in the Notice to bring the international broadcasting rules into conformance with the Radio Regulations, we are persuaded that our rules should, as nearly as practicable, be consistent with the technical standards on which the IFRB bases its technical examination of notified frequency assignments in this service.

32. On the other hand, we find merit in the above-mentioned arguments for deleting the present 43.5 dBu requirement for field strength to be delivered to desired areas of reception. We have therefore decided to adopt rules which encourage compliance with the technical standards adopted by the IFRB but with provisions permitting lesser values of median field strengths in which it will be emphasized that no protection from interference will be provided by the IFRB if their technical examination of notifications with lesser values reveals incompatibilities with other notified assignments fully complying with IFRB technical standards.[9] Therefore, licensees proposing frequency-

[9] In accordance with the procedures of the International Telecommunication Union (ITU) under Article 10, about 4 months before the start of a new season each administration is required to notify the International Frequency Registration Board in Geneva of the schedules of operation each proposes to use during that season. The IFRB examines these notifications and, using its Technical Standards, Series A, determines conflicting proposals. These conflicts are reported to the administrations involved for resolution before the season commences.

hour assignments in this category are forewarned of the risk factor involved in such proposals. In any event, we are requiring that licensees submit, with their seasonal frequency-hour requests, all pertinent technical data with reference to the frequencies and hours of operation which should be so chosen that a given frequency will provide the largest period of reliable transmission to selected areas of reception as practicable. The data should also include the predicted median field strength at the desired zone or area of reception even though we are deleting the 43.5 dBu field strength requirement.

Power requirement

33. Proposed Section 73.751 would require licensees to have transmitter equipment with a rated carrier power of not less than 50 kW. One party suggests that this proposal be modified to provide for the use of 10 kW transmitters under some circumstances rather than have an arbitrary 50 kW minimum permissible power requirement. It urges that no amount of power is effective when a high frequency band is "not open," and that conversely, little is required when conditions are favorable. This party points to its experience with 10 kW transmitters on the 21 meter band which indicated that under certain conditions such stations could provide good service. It should be noted that this suggestion does not request an across-the-board minimum permissible standard of 10 kW. However, one party, in response to the suggestion that 10 kW be permitted under some circumstances, stated that it opposed an across-the-board standard of 10 kW, and gave supporting reasons.

34. Having considered the matter, we are of the view that with a minimum permissible transmitter power of 50 kW, usable signals are more likely to be delivered to the zones and areas of reception which licensees serve. It was this fact that partly entered into our decision to delete the requirement of a 43.5 dBu minimum permissible delivered field strength. Accordingly, we do not adopt the suggestion mentioned above.

Optimum working frequency (FOT)

35. Proposed Section 73.702(g) provides that frequencies requested for assignment must be as near as possible to the FOT for the zone or area of reception for the period and path of transmission, and should be so chosen that a given frequency will provide the largest period of reliable transmission to the selected zone or area of reception. One party opposes any unwavering requirement that the requested frequency be as near as possible to the FOT. It states that there are times when the frequency nearest to the FOT is actually in the 17,-21 or 26 megahertz bands where there are so few short-wave receivers and thus listeners, that adequacy of coverage is sacrificed for a theoretical improvement in signal already known to be satisfactory.

36. Although it is the contention of other parties filing comments regarding this matter that, in general, the FOT will provide the strongest signal and the highest reliability at any given time, we are of the opinion that the point raised has sufficient merit to warrant consideration in special cases. Therefore, the rule which we adopt will permit some flexibility to licensees, upon sufficient justification, to select frequencies that are not as near as possible to the FOT.

Table of reference points

37. The Notice proposed to delete present Section 73.703 which contains latitude and longitude reference points of target areas used in field strength calculations. Comments were invited on whether such a table is needed in the rules (whether or not the 43.5 dBu delivered field strength requirement was modified or deleted) and on what the reference points should be if such points are to be retained in the rules. Only one party commented on this subject stating that the reference points are not needed since it appears that almost any point could be selected within the zone or area of reception. It is further stated that although the reference points in the present rules, being on whole degrees of latitude and longitude, were convenient, using computer programs to calculate the propagation predictions as is normally done today makes the handling of decimal parts of latitude and longitude no problem at all. In addition it is said that the antennas used in this service are of such beam width that from any distance that one would use a short-wave transmitter, the entire area of reception normally is covered; hence any reference point taken within the zone would be satisfactory.

38. Our decision in this matter is not to have a table of latitude and longitude reference points. It is noted that specific reference points are not listed in the ITU Radio Regulations. However, calculations of propagation predictions to zones or areas of reception shown on the map in new Section 73.703 adopted today should be based on transmission paths from transmitter location to a convenient point in the desired zones or areas of reception.

Field strength protection ratios

39. In the Notice (para. 25), we proposed to delete the present provisions of Section 73.702(g) and (h) which provide that international broadcasting stations must provide minimum co-channel and adjacent channel delivered median field strength protection ratios of 40 db and 11 db, respectively, to the transmissions of other international broadcasting stations at the target area which, in the opinion of the Commission, have priority of assignment. In lieu thereof, we proposed a broad general requirement—without specific standards—that licensees shall provide protection to the transmissions of other stations (at the target areas of those other stations) which the Commission considers to have priority of assignments. Parties commenting on this matter favor our proposal.

40. Specific signal/interference protection ratios have been adopted by the IFRB for application in their technical examinations of notified assignments. IFRB Technical Standards, Series A, Section A–1, page 8, (Note 2) reads as follows:

> In the application of the procedure prescribed in Article 10 of the Radio Regulations, a calculated protection ratio of less than 23 db is taken by the Board to indicate an apparent incompatibility.

Since licensees will not normally have the necessary information to make such determinations until after notifications from all high-frequency broadcasters have been received by the IFRB from season to season and tentative seasonal schedules have been published, we are of the opinion that the broad general requirement that we proposed

should be adopted. However, the technical standards of IFRB will be applied upon notification by the IFRB of apparent incompatibilities, which may require adjustments of operating schedules.

OTHER MATTERS

Multiple ownership

41. The Notice (paras. 39–40) invited comments on whether the rules should restrict the number of private international broadcasting stations that a party may own, operate, or control. It also noted that a licensee having more than one transmitter, under a single license, each of which beams to a different target area has, in effect, more than one station when compared to a licensee having only a single transmitter (and directional array). Comments were therefore requested on the topic of whether a limit should be imposed on the number of transmitters a party might have under a single license. We also inquired whether if licensees are permitted to have more than one transmitter under a single license, the transmitters should be required to be located at the same place or be permitted to be situated at different locations.

42. In response to the foregoing, parties variously state the following. A multiple ownership rule is unnecessary, at least at the present time. However, if the Commission believes otherwise, it would be no burden if a rule provided for common ownership of not more than two stations with eight main transmitters. This, it is suggested, would permit present licensees to expand their operations if they could afford it, but they could not dominate the field. Limiting ownership to but a single station appears to be too stringent and actually self-defeating to the objectives of this country if one considers the paucity of organizations that might engage in international broadcasting.

43. Multiple ownership rules may be desirable for domestic broadcasting stations in order to promote, for example, diversity of viewpoints within a single market and to prevent undue concentration of control in those markets. However, such rules are unnecessary for international broadcasting because the air is filled with short-wave transmissions carrying programming and newsworthy information from nearly every country in nearly every language and representing nearly every ideology; and there is thus no danger that a single licensee in the United States might acquire undue control of this great communications medium.

44. As to transmitters, neither the Commission nor any other party has shown that owning and operating more than one transmitter under a single license has caused injury either in this country or abroad. As private international broadcasting develops there may be reason to limit the number of transmitters but there appears to be no present reason to do so. Additionally, rules should not be adopted which prevent a licensee from having one or more antenna or transmitter sites. The important consideration is that a station be able to provide the best and most efficient short-wave service to its authorized zones or areas of reception, and it might best do this by having multiple transmitter locations. From the point of view of the listener overseas who is tuning in to a short-wave station located in the United States, the

important thing is that the station is in the United States and not that the transmitter is located at one site or another.

45. Of the foregoing arguments, we believe that the view that there are presently so many short-wave stations broadcasting from so many countries that no one party in the United States could acquire control of the medium misses the point. The objective of multiple ownership rules for international broadcasting would be to assure a diversity of programming and views emanating from the United States, not to assure that a single licensee would not control the medium internationally. However, aside from that, we find merit in the views set forth above, and do not now adopt any rules limiting the number of stations that a single party may own, operate, or control, the number of transmitters that a single licensee may have, or the number of sites at which transmitters of a single station may be located. All of these matters will be handled on a case-by-case basis.

License period

46. Presently the rules provide for a license period of one year for private international broadcasting stations. The Notice (para. 27) stated that the Commission saw no reason why the term should not be three years as is the case for other broadcast services. Generally the comments are silent on this matter. However, at least one party endorses the proposal. Another, stating that the present term of one year is unrealistic and that a three-year term would not encourage new stations, suggests a license term of ten years. Such a term, however, cannot be considered in view of Section 307(d) of the Communications Act which limits broadcast license terms to three years. We adopt the proposed three-year term.

Fees

47. In a Notice of Proposed Rule Making in Docket No. 19658, 37 Fed. Reg. 28574 (Dec. 27, 1972), the Commission began a proceeding to make broad revisions of its present fee schedule. Paragraph 28 of that notice referred to the fact that the present rule making proceeding was pending and that the matter of fees for the international broadcasting service would be treated herein. Although comments concerning such fees have been duly filed in this docket, we believe, on further consideration, that it is best to defer final decisions on this subject until such time as decisions are reached in Docket No. 19658.

Miscellaneous topics

48. *Multiple frequency operation.* Present Section 73.702(f) reads as follows:

> Not more than one frequency will be authorized for use at any one time for any one program transmission except in instances where a program is intended for reception in more than one target area and the intended target areas cannot be served by a single frequency.

The Notice proposed to amend that section to read:

> Not more than one frequency will be assigned for use at any one time for any one program transmission to any single zone or area of reception in a specific band.

49. There seems to be confusion as to the meaning of the present rule. Many parties state that the rule recognizes the fact that certain

target areas require simultaneous operation on more than one frequency to assure adequate coverage of the area. They also state that it has been common practice for VOA, Armed Forces Radio Service, and other international broadcasters to engage in such simultaneous multiple transmissions. However, the rule means what its clear language says, namely, that at any particular time only one frequency may be used to transmit any one program to one target area. Only if a station is beaming the same program to more than one target area at the same time may it use more than one frequency. The purpose of the rule is to avoid frequency congestion. It is true that many international broadcasters do broadcast in tandem on multiple frequencies to the same target area at the same time, but our rule does not permit licensees to do this.

50. The rule which we proposed has also been misinterpreted in the comments. For some reason, the same parties who misconstrue our present rule have also misconstrued our proposal as prohibiting broadcasting the same program to the same zone or area of reception on multiple frequencies at the same time. Such was not the purpose. It was the intent of the proposal to permit such operations, but only if the frequencies used were in different bands. In other words, we were willing to recognize tandem operation as a fact of life, even though it causes frequency congestion, but were restricting it is usage of a single frequency in any one band.

51. Parties who made this double misconstruction urge that we not adopt the proposal and that we retain the present rule. On further considering the matter, we believe it best to retain the old rule but to add to it a proviso that on a showing of good cause a licensee may be authorized such multiple frequency operation.

52. *Rebroadcast consent.* The Notice proposed deletion of paragraph (c) of Section 73.790 governing rebroadcasting. That paragraph reads:

> A licensee of an international broadcast station may authorize the rebroadcast of its programs by any station outside the limits of the North American continent without permission from the Commission: *Provided*, That the station rebroadcasting the programs cannot be received consistently in the United States.

Of the two parties commenting on this proposal, one supported it. The other opposed it if deletion meant that a private international broadcasting station might not under any circumstances authorize the rebroadcast of its programs by stations outside North America. It based its position on the fact that much of its programming was directed to Latin America and that stations there rebroadcast its programs because of their quality, a practice of which the commenting party approved because it viewed this as a worthwhile way to cement good relations between countries. We assure that party that the intent of the deletion is such that it need have no concern on this score, and paragraph (c) of Section 73.790 is accordingly deleted. Paragraphs (a) and (b) of this section have been redrafted to clarify them and to relax some of the present provisions.

53. *Contract operation.* Present rules permit a licensee to enter into contracts with an agency of the United States Government to broadcast programming subject to Governmental control as to content,

target areas to be covered, and time of broadcast. In view of the fact that the VOA no longer enters into such agreements, we proposed to delete provisions pertaining to contract operation. It has been suggested in the comments that the provisions be retained since at some time in the future, VOA, Radio Free Europe, Radio Liberty, AFRTS or some other governmental agency might have reason to desire to use the facilities of Commission licensees, and no purpose is served by deletion. As stated previously (para. 12), some parties urge that one of the reasons private international broadcasting is important is that overseas listeners find it to be more credible than that of governmental agencies. Without making a judgment on this question, we observe that to permit governmental agencies to broadcast over private facilities could be confusing to the foreign listener who might not know whether the programs heard were private or governmental. In any event, as stated, government agencies are not now making use of contract operation. Should they desire to do so in the future, we believe it best to handle such requests on a case-by-case basis rather than under a general rule. Accordingly the contract provisions of the present rules will be deleted as proposed.

54. *Commercial or sponsored programs.* Present Section 73.788(b) contains rules governing commercial continuities. Among other things, they provide that such continuities may give no more than the name of the sponsor of the program and the name and general character of the commodity. Although we did not propose to modify this section, one party suggested its deletion, stating that it is unnecessary and a harmful restriction of private international broadcasters because advertisers are not interested in buying time on a purely institutional basis. The rule was originally adopted because it appeared that institutional advertising would create a better impression of the United States. Only a single party has suggested deletion, and we do not believe that the arguments mentioned above constitute a showing sufficient to overcome the original reasons for adoption.

55. *Change in transmitter location.* The proposed amendment to Section 1.574 concerning processing of international broadcasting applications stated that a change in transmitter location, other than local, would be viewed as a major change. Similar language appears in the present rule. One party suggested that "local" be defined either in the rule or in this Report and Order in terms of mileage, community, county or state boundaries or in some other fashion. Our intent is that a local change in transmitter location means a change of transmitter location in the immediate vicinity of the existing antennas of the station, and the language of the rule is being amended accordingly.

56. In addition to all of the amendments discussed above, we note that a variety of other amendments were suggested in the Notice. They are not discussed here because they were unopposed in the comments, and are adopted as proposed or with minor modifications.

ORDERS

57. In view of the foregoing, IT IS ORDERED, That, effective August 20, 1973, Parts 1 and 73 of the Commission Rules and Regulations ARE AMENDED as set forth in the Appendix hereto. Author-

ity for this action is contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended.

58. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED except for the matter of fees to be charged in the international broadcasting service, and as to that matter the proceeding IS NOT TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

APPENDIX

Part 1, Subpart D—Broadcast Applications and Proceedings, of the Commission's Rules and Regulations, is amended as follows:

1. Paragraph (a) of Section 1.574 is amended to read as follows:

§ 1.574 Processing of international broadcasting applications.

(a) Applications for international broadcasting facilities are divided into two groups.

(1) In the first group are applications for new stations, or for major changes in the facilities of authorized stations. A major change is (i) any change in or addition to authorized zones or areas of reception, (ii) any change in transmitter location other than one in the immediate vicinity of existing antennas of the station, or (iii) any change in power, or antenna directivity: *Provided, however,* That the Commission may, within 15 days after the acceptance for filing of any other application for modification, advise the applicant that such application is considered to be one for a major change and therefore is subject to the provisions of Sections 1.580 and 1.1111 pertaining to major changes.

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

* * * * * * *

Part 73, Subpart F—International Broadcasting Stations, of the Commission's Rules and Regulations, is amended as follows:

1. Section 73.701 is amended to read as follows:

DEFINITIONS AND ALLOCATION OF FACILITIES

§ 73.701 Definitions.

The following definitions apply to terminology employed in this subpart:

(a) *International broadcasting stations.* A broadcasting station employing frequencies allocated to the broadcasting service between 5,950 and 26,100 kHz, the transmissions of which are intended to be received directly by the general public in foreign countries. (A station may be authorized more than one transmitter.) There are both government and non-government international broadcasting stations; only the latter are licensed by the Commission and are subject to the rules of this subpart.

(b) *Transmitter-hour.* One frequency used on one transmitter for one hour.

(c) *Frequency-hour.* One frequency used for one hour regardless of the number of transmitters over which it is simultaneously broadcast by a station during that hour.

(d) *Multiple operation.* Broadcasting by a station on one frequency over two or more transmitters simultaneously. If a station uses the same frequency simultaneously on each of two (three, etc.) transmitters for an hour, it uses one frequency-hour and two (three, etc.) transmitter-hours.

(e) *Day.* Any twenty-four hour period beginning 0100 GMT and ending 0100 GMT.

(f) *Sunspot number.* The 12-month running average of the number of sunspots for any month as indicated in the U.S. Department of Commerce Telecommunications Research and Engineering Report No. 13—available from the Superintendent of Documents, Washington, D.C. 20402. The sunspot number varies in an approximate 11-year cycle.

(g) *March season.* That portion of any year commencing 0100 GMT on the first Sunday in March and ending at 0100 GMT on the first Sunday in May.

(h) *May season.* That portion of any year commencing at 0100 GMT on the first Sunday in May and ending at 0100 GMT on the first Sunday in September.

(i) *September season.* That portion of any year commencing at 0100 GMT on the first Sunday in September and ending at 0100 GMT on the first Sunday in November.

(j) *November season.* That portion of any year commencing at 0100 GMT on the first Sunday in November and ending at 0100 GMT on the first Sunday in March.

(k) *Seasonal schedule.* An assignment, for a season, of a frequency or frequencies, and other technical parameters, to be used by a station for transmission to particular zones or areas of reception during specified hours.

(l) *Reference month.* That month of a season which is used for determining predicted propagation characteristics for the season. The reference month is January, April, July, or October, as related to the season in which it occurs.

(m) *Maximum usable frequency (MUF).* The highest frequency which is returned by ionospheric radio propagation to the surface of the earth for a particular path and time of day for 50 percent of the days of the reference month.

(n) *Optimum working frequency (FOT).* The highest frequency which is returned by ionospheric radio propagation to the surface of the earth for a particular path and time of day for 90 percent of the days of the reference month.

Note: The international abbreviation for optimum working frequency, FOT, is formed with the initial letters of the French words for "optimum working frequency" which are "fréquence optimum de travail."

(o) *Zone of reception.* Any geographic zone indicated in § 73.703 in which the reception of particular programs is specifically intended and in which broadcast coverage is contemplated.

(p) *Area of reception.* Any geographic area smaller than a zone of reception in which the reception of particular programs is specifically intended and in which broadcast coverage is contemplated, such areas being indicated by countries or parts of countries.

(q) *Delivered median field strength, or field strength.* The field strength incident upon the zone or area of reception expressed in microvolts per meter, or decibels above one microvolt per meter, which is exceeded by the hourly median value for 50 percent of the days of the reference month.

(r) *Carrier power.* The average power supplied to the antenna transmission line by a transmitter during one radio frequency cycle under conditions of no modulation.

2. Section 73.702 is amended to read as follows:

§ 73.702 Assignment and use of frequencies.

(a) Frequencies will be assigned by the Commission prior to the start of each season to authorized international broadcasting stations for use during the season at specified hours and for transmission to specified zones or areas of reception, with specified power and antenna bearing. Six months prior to the start of each season, licensees and permittees shall by informal written request, submitted to the Commission in triplicate, indicate for the reason the frequency or frequencies desired for transmission to each zone or area of reception specified in the license or permit, the specific hours during which it desires to transmit to such zones or areas on each frequency, and the power, antenna gain, and antenna bearing it desires to use. Requests will be honored to the extent that interference and propagation conditions permit and that they are otherwise in accordance with the provisions of this section.

(b) After necessary processing of the requests required by paragraph (a) of this section, the Commission will notify each licensee and permittee of the frequencies, hours of use thereof to specified zones or areas of reception, power, and antenna bearing which it intends to authorize for the season in question. After receipt of such notification, the licensee or permittee shall, in writing, not later than two months before the start of the season in question, inform the Commission either that it plans to operate in accordance with the authorization which the Commission intends to issue, or that it plans to operate in another manner. If the licensee or permittee indicates that it plans to operate in another manner, it shall furnish explanatory details.

(c) If after submitting the request required under the provisions of paragraph (a) of this section, but before receipt of the Commission's notification referred to in paragraph (b) of this section, the licensee or permittee submits a request for changes of its original request, such requests will be accepted for consideration only if accompanied by statements showing good cause therefor and will be honored only if conditions permit. If the information required to be submitted by the licensee or permittee under the provisions of paragraph (b) of this section indicates that operation in another manner is contemplated, and the explanatory details contain a request for change in the originally proposed manner of operation, such requests will be accepted for consideration only if accompanied by statements showing good cause therefor and will be honored only if conditions permit. If after the licensee or permittee submits the information required under the provisions of paragraph (b) of this section, but before the start of the season in question, the licensee or permittee submits a request for changes in its manner of operation for the season in question, the request will be accepted for consideration only if accompanied by statements showing good cause therefor and will be honored only if conditions permit. If after the start of a season the licensee or permittee submits a request for changes in the manner of operation as authorized, the request will be considered only if accompanied by statements showing good cause therefor, and will be honored only if conditions permit.

(d) The provisions of paragraphs (a), (b), and (c) of the section shall apply to licensees, to permittees operating under program test authority, and to permittees who anticipate applying for and receiving program test authority for operation during the specified season.

NOTE: Permittees who during the process of construction wish to engage in equipment tests shall by informal written request, submitted to the Commission in triplicate not less than 30 days before they desire to begin such testing, indicate the frequencies they desire to use for testing and the hours they desire to use those frequencies. No equipment testing shall occur until the Commission has authorized frequencies and hours for such testing. Such authorizations shall be only for one season, and if it is desired to continue equipment testing in a following season, new requests for frequencies and hours must be submitted at least 30 days before it is desired to begin testing in the following season.

(e) Within 14 days after the end of each season, a report shall be filed with the Commission by each licensee or permittee operating under program test authority who has been issued a seasonal schedule for that season. The report shall state whether the licensee or permittee has operated the number of frequency-hours authorized by the seasonal schedule to each of the zones or areas of reception specified in the schedule. If such operation has not occurred, a detailed explanation of that fact shall also be submitted which includes specific dates, frequency-hours not used, and reasons for the failure to operate as authorized. The report shall also contain information that has been received by the licensee or permittee as to reception or interference, and conclusions with regard to propagation characteristics of frequencies that were assigned for the season in question.

(f) Frequencies assigned by the Commission shall be within the following bands which are allocated exclusively to the international broadcasting service:

5,950– 6,200 kHz	17,700–17,900 kHz
9,500– 9,775 kHz	21,450–21,750 kHz
11,700–11,975 kHz	25,600–26,100 kHz
15,100–15,450 kHz	

The carrier frequencies assignable shall begin 5 kHz above the frequency specified above for the beginning of each band and shall be in successive steps of 5 kHz to and including 5 kHz below the frequency specified as the end of each band.

(g) Frequencies requested for assignment must be as near as practicable to the optimum working frequency (unless otherwise justified) for the zone or area of reception for the period and path of transmission, and should be chosen so that a given frequency will provide the largest period of reliable transmission to the selected zone or area of reception. Moreover, at the zone or area of reception frequencies shall provide protection to the transmissions of other broadcasting stations which, in the opinion of the Commission, have priority of assignment.

NOTE 1: Requests for frequency-hours shall be accompanied by all pertinent technical data with reference to the frequencies and hours of operation, including calculated field strengths delivered to the zones or areas of reception.

NOTE 2: It is preferable that calculated field strengths delivered to zones or areas of reception be equal to or greater than those required by I.F.R.B. Technical Standards, Series A (and supplements thereto), in order for the I.F.R.B. to afford the notified assignment protection from interference. Nevertheless, calculated field strengths less than those required by the I.F.R.B. standards for protection will be acceptable to the Commission. However, licensees should note that if such lesser field strengths are submitted no protection from interference will be provided by the I.F.R.B. if their technical examination of such notifications show incompatibilities with other notified assignments fully complying with I.F.R.B. technical standards.

NOTE 3: Licensees are permitted to engage in multiple operation as defined in Section 73.701(d) of this chapter.

NOTE 4: Seasonal requests for frequency-hours will be only for transmissions to zones or areas of reception specified in the basic instrument of authorization. Changes in such zones or areas will be made only on separate application for modification of such instruments.

(h) Not more than one frequency will be assigned for use at any one time for any one program transmission except in instances where a program is intended for reception in more than one zone or area of reception and the intended zones or areas cannot be served by a single frequency: *Provided, however,* That on a showing of good cause a licensee may be authorized to operate on more than one frequency at any one time to transmit any one program to a single zone or area of reception.

(i) Any frequency assigned to a licensee or permittee shall also be available for assignment to other licensees or permittees.

(j) All assignments of frequencies and the hours during which they will be used will be made with the express understanding that they are subject to immediate cancellation or change without hearing whenever the Commission determines that interference or propagation conditions so require and that each frequency-hour assignment for a given seasonal schedule is unique unto itself and not necessarily available for use during a subsequent season.

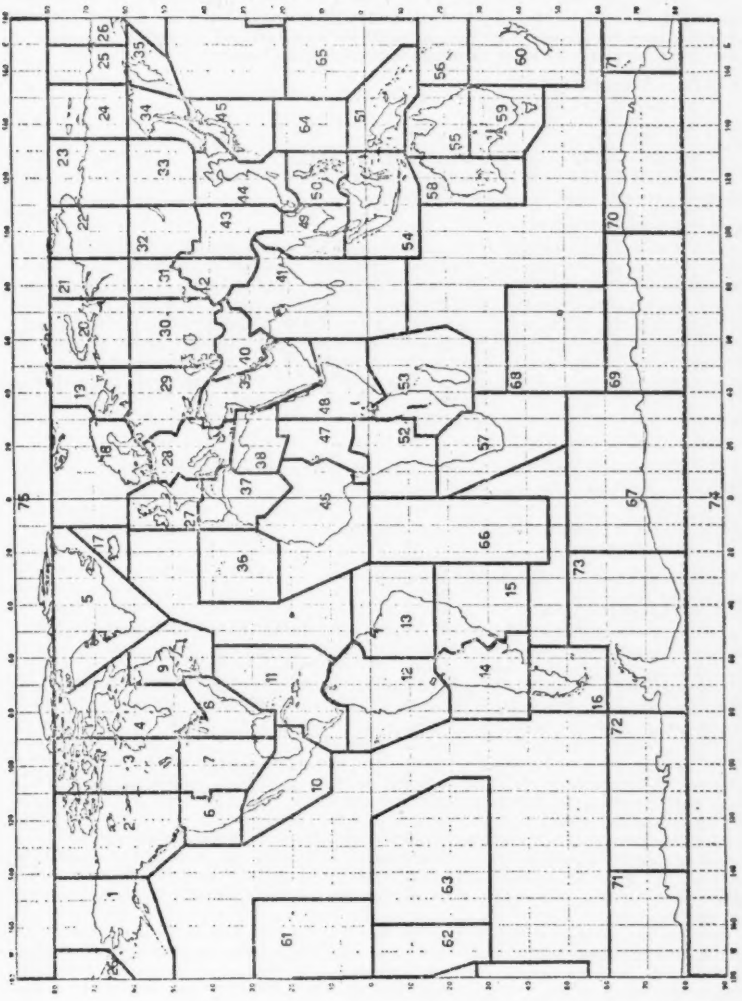
(k) The total maximum number of frequency-hours which will be authorized to all licensees of international broadcasting stations during any one day for any season is 100. The number of frequency-hours allocated to any licensee will depend on past usage, availability, and need. If for a forthcoming season the total of the requests for daily frequency-hours of all licensees exceeds 100, all licensees will be notified and each licensee that makes an adequate showing that good cause exists for not having its requested number of frequency-hours reduced and that operation of its station without such reduction would be consistent with the public interest may be authorized the frequency-hours requested.

NOTE: The provisions of this paragraph are not to be construed to mean that a total of 100 (or more) frequency-hours per day is assured licensees. Frequency-hours will only be assigned to the extent that they are available. It is the responsibility of each licensee to make all technical studies to show that frequency-hours requested by it are available and suitable for use as proposed.

3. Sections 73.303 and 73.704 are deleted, and Section 73.792 is redesignated Section 73.703 and amended by adding introductory language thereto and substituting a new map for the old map therein as follows:

§ 73.303 Geographical zones and areas of reception.

The zones or areas of reception to be served by international broadcasting stations shall be based on the following map, and directive antennas shall be employed to direct transmissions thereto:



41 F.C.C. 2d

§ 73.710 [Amended]

4. Section 73.710 is amended by adding the following NOTE at the end thereof:

NOTE: Information required by these rules but not required by the application forms specified in Subpart D of Part 1 of this chapter shall be submitted as a supplement to the application and will be considered as a part thereof. Applications for renewal of license shall be accompanied by copies of program logs for the composite week designated by the Commission.

§ 73.711 [Amended]

5. Section 73.711 is deleted.

§ 73.712 [Amended]

6. Section 73.712 is redesignated Section 73.711.

7. Section 73.716 is redesignated Section 73.712, and paragraphs (a) and (c) thereof are amended to read as follows:

§ 73.712 Equipment tests.

(a) During the process of construction of an international broadcasting station, the permittee, having obtained authorization for frequencies and hours as set forth in the NOTE to Section 73.702(d) of this chapter, and having thereafter notified the Engineer in Charge of the radio district in which the station is located may, without further authority of the Commission, conduct equipment tests for the purpose of such adjustments and measurements as may be necessary to assure compliance with the terms of the construction permit, the technical provisions of the application therefor, and the rules and regulations. Such tests shall use voice identification and test tones only. No programming shall be conducted during equipment tests.

* * * * * * *

(c) Equipment tests may be continued so long as the construction permit shall remain valid: *Provided, however,* That the procedure set forth in paragraph (a) of this section must be repeated prior to the conducting of such tests in each season after the season in which the testing began.

* * * * * * *

8. New section 73.713 is added as follows:

§ 73.713 Program tests.

(a) Upon completion of construction of an international broadcasting station in accordance with the terms of the construction permit, the technical provisions of the application therefor, and the rules and regulations and the applicable engineering standards, and when an application for station license has been filed showing the station to be in satisfactory operating condition, the permittee may request authority to conduct program tests: *Provided,* That such request shall be filed with the Commission at least ten (10) days prior to the date on which it is desired to begin such operation and that the Engineer in Charge of the radio district in which the transmitter(s) is located is notified. (All data necessary to show compliance with the terms and conditions of the construction permit must be filed with the license application.)

(b) Program tests shall not commence until specific Commission authority is received. The Commission reserves the right to change the date of the beginning of such tests or to suspend or revoke the authority for program tests as and when such action may appear to be in the public interest, convenience, and necessity.

(c) Unless sooner suspended or revoked, program test authority continues valid during Commission consideration of the application for license and during this period further extension of the construction permit is not required. Program test authority shall be automatically terminated by final determination upon the application for station license.

(d) All operation under program test authority shall be in strict compliance with the rules governing international broadcasting stations and in strict accordance with representations made in the application for license pursuant to which the tests were authorized.

(e) The granting of program test authority shall not be construed as approval by the Commission of the application for station license.

§ 73.718 [Deleted]

9. Section 73.718 is redesignated Section 73.733 and amended to read as follows:

§ 73.733 Normal license period.

All international broadcasting station licenses will be issued so as to expire at the hour of 3 a.m. local time and will be issued for a normal license period of 3 years expiring November 1.

10. Section 73.731 and headnote are amended to read as follows:

§ 73.731 Licensing requirements.

(a) A license for an international broadcasting station will be issued only after a satisfactory showing has been made in regard to the following, among others:

(1) That there is a need for the international broadcasting service proposed to be rendered.

(2) That the necessary program sources are available to the applicant to render the international service proposed.

(3) That the production of the program service and the technical operation of the proposed station will be conducted by qualified persons.

(4) That the applicant is legally, technically and financially qualified and possesses adequate technical facilities to carry forward the service proposed.

(5) That the public interest, convenience and necessity will be served through the operation of the proposed station.

11. New section 73.732 is added to read as follows:

§ 73.732 Authorizations.

Authorizations issued to international broadcasting stations by the Commission will be authorizations to permit the construction or use of a particular transmitting equipment combination and related antenna systems for international broadcasting, and to permit broadcasting to zones or areas of reception specified on the instrument of authorization. The authorizations will not specify the frequencies to be used or the hours of use. Requests for frequencies and hours of use will be made as provided in Section 73.702 of this chapter. Seasonal schedules, when issued pursuant to the provisions of Section 73.702 of this chapter, will become attachments to and part of the instrument of authorization, replacing any such prior attachments.

12. Section 73.751 is amended to read as follows:

§ 73.751 Power requirement.

No international broadcasting station will be authorized to install, or be licensed for operation of, transmitter equipment with a rated carrier power of less than 50 kilowatts.

§ 73.752 [Amended]

13. Section 73.752 is deleted.

14. Section 73.753 is amended to read as follows:

§ 73.753 Antenna.

All international broadcasting stations shall operate with directional antennas. Such antennas shall be designed and operated so that the radiated power in the maximum lobe toward the specific zone or area of reception intended to be served shall be at least 10 times the average power from the antenna in the horizontal plane. Radiation in all other directions shall be suppressed to the maximum extent technically feasible. In order to eliminate or mitigate harmful interference, the direction of the maximum lobe may be adjusted upon approval of the Commission.

15. Section 73.756 is amended to read as follows:

§ 73.756 Required transmitter performance.

(a) *Design.* The construction, installation, operation, and performance of the international broadcasting transmitter system shall be in accordance with good engineering practice.

(b) *Spurious emission.*

(1) Any emission appearing on a frequency removed from the carrier frequency by between 6.4 kHz and 10 kHz, inclusive, shall be attenuated at least

25 decibels below the level of the unmodulated carrier. Compliance with the specification will be deemed to show the occupied bandwidth to be 10 kHz or less.

(2) Any emission appearing on a frequency removed from the carrier frequency by more than 10 kHz and up to and including 25 kHz shall be attenuated at least 35 decibels below the level of the unmodulated carrier.

(3) Any emission appearing on a frequency removed from the carrier frequency by more than 25 kHz shall be attenuated at least 80 db below the level of the unmodulated carrier.

(4) In the event spurious emissions cause harmful interference to other stations or services, such additional steps as may be necessary to eliminate the interference must be taken immediately by the licensee.

(c) *Frequency control.* The transmitter shall be equipped with automatic frequency control apparatus so designed and constructed that it is capable of maintaining the operating frequency within 0.0015 percent of the assigned frequency.

16. Section 73.759 is amended to read as follows:

§ 73.759 Changes in equipment and antenna systems.

Specific authority, upon filing formal application (FCC Form 309) therefor, is required for any of the following changes:

(a) Change involving an increase or decrease in the power rating of the transmitters.

(b) A replacement of the transmitters as a whole.

(c) Change in the location of the transmitting antenna.

(d) Change in location of main studio, if it is proposed to move the main studio to a different city from that specified in the license.

(e) Change in the power delivered to the antenna.

(f) Change in frequency control and/or modulation system.

(g) Change in direction or gain of antenna system.

Other changes, not specified above in this section, may be made at any time without the authority of the Commission, provided that the Commission shall be immediately notified thereof and such changes shall be shown in the next application for renewal of license.

17. Section 73.761 is amended to read as follows:

§ 73.761 Time of operation.

(a) All international broadcasting stations shall operate in accordance with the times indicated on their seasonal schedules.

(b) In the event that causes beyond a licensee's control make it impossible to adhere to the seasonal schedule or to continue operating, the station may limit or discontinue operation for a period of not more than 10 days, without further authority from the Commission. However, in such cases, the Commission and the Engineer in Charge of the radio district in which the station is located shall be immediately notified in writing of such limitation or discontinuance of operation and shall subsequently be notified when the station resumes regular operation.

(c) In the event that causes beyond a licensee's control make it impossible to adhere to the seasonal schedule or to continue operating for a temporary period of more than ten days, the station may not limit or discontinue operation until it requests and receives specific authority to do so from the Commission. When the station subsequently resumes regular operation after such limited operation or discontinuance of operation, it shall notify the Commission and the Engineer in Charge of the radio district in which the station is located.

18. Section 73.763 and headnote are amended to read as follows:

§ 73.763 Station license and seasonal schedules, posting of.

The original of each station license and of the current seasonal schedule shall be posted in the transmitter room.

19. Section 73.765 and headnote are amended to read as follows:

§ 73.765 Operating power; how determined and maintained.

The operating power specified in Section 73.751 shall be determined by use of a calibrated dummy load or by any other method specified by the licensee and

accepted by the Commission. Such method may subsequently be used by the licensee to maintain the authorized operating power.

20. Section 73.766 and headnote are amended to read as follows:

§ 73.766 Modulation and bandwidth.

The percentage of modulation shall be maintained as high as possible consistent with good quality of transmission and good broadcast practice. In no case shall it exceed 100 percent on positive or negative peaks of frequent recurrence. It should not be less than 85 percent on peaks of frequent recurrence. The range of modulation frequencies shall be so controlled that the authorized bandwidth of the emission shall not be exceeded under all conditions of modulation. The highest modulating frequency shall not exceed 5 kHz.

21. Section 73.769 is amended to read as follows:

§ 73.769 Discontinuance of operation.

The licensee of each station shall notify the Commission in Washington, D.C., and the Engineer in Charge of the radio district where such station is located of permanent discontinuance of operation at least two days before operation is discontinued. The licensee shall, in addition, immediately forward the station license and other instruments of authorization to the Washington, D.C. office of the Commission for cancellation.

§ 73.787 [Amended]

22. Section 73.787 is amended by deleting paragraph (c) thereof.

23. Section 73.788(c) is amended to read as follows:

§ 73.788 Service; commercial or sponsored programs.

* * * * * * *

(c) The geographic areas to be served by international broadcasting stations are the zones and areas of reception shown in § 73.703.

* * * * * * *

24. Section 73.790 is amended to read as follows:

§ 73.790 Rebroadcast.

(a) No international broadcasting station shall rebroadcast the program, or any part thereof, of another United States broadcasting station without the express authority of the originating station. A copy of the written consent of the licensee originating the program shall be kept by the licensee of the station rebroadcasting such program and shall be made available to the Commission upon request. The broadcasting of a program relayed by a remote pick-up broadcast station (§ 74.401 of this chapter) is not considered a rebroadcast.

(b) The retransmission of point-to-point messages originated by government or privately owned *non-broadcast* stations must be authorized by the Commission prior to retransmission; requests for such authority may be submitted informally (by letter) accompanied by the written consent of the originating station.

§ 73.791 [Amended]

25. Section 73.791 is deleted.

§ 73.792 [Amended]

26. Section 73.792 is deleted.

F.C.C. 73R–248

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEXINGTON COUNTY BROADCASTERS, INC., CAYCE, S.C.	Docket No. 19568 File No. BPH–7605
WILLIAM D. HUNT, CAYCE, S.C.	Docket No. 19569
For Construction Permits	File No. BPH–7658

MEMORANDUM OPINION AND ORDER

(Adopted July 2, 1973; Released July 9, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING. BOARD MEMBER BERKEMEYER DISSENTING IN PART AND VOTING TO ADD REQUESTED ISSUE ON FAIRNESS AND PERSONAL ATTACK. BOARD MEMBER KESSLER DISSENTING IN PART AND VOTING TO ADD A COMPARATIVE ISSUE ONLY WITH RESPECT TO OVER-COMMERCIALIZATION.

1. This proceeding involves the mutually exclusive applications of Lexington County Broadcasters, Inc. (Lexington County) and William D. Hunt (Hunt) for authorization to construct a new FM broadcast station in Cayce, South Carolina. It was designated for a comparative hearing by Order, released August 15, 1972.[1] Now before the Review Board is a petition to enlarge issues, filed by Hunt on December 11, 1972, requesting the addition of issues to determine whether Lexington County, as licensee of standard broadcast Station WCAY, Cayce, South Carolina, has misrepresented its commercialization and news practices in its renewal applications for Station WCAY, and whether it has complied with the fairness doctrine and personal attack rule in connection with the operation of that station.[2]

TIMELINESS

2. Hunt concedes that his petition is filed late, but contends that good cause exists to warrant its acceptance. In support, petitioner maintains that a "substantial portion" of the materials supporting his petition consist of Station WCAY's program logs which were not obtained by petitioner until November 24, 1972, "after no small resistance from Lexington."[3] The Broadcast Bureau contends that the peti-

[1] The Order issued by the Chief of the Broadcast Bureau, acting under delegated authority of the Commission, was published in the Federal Register on August 19, 1972, 37 FR 16820.

[2] Also before the Review Board are: (a) the Broadcast Bureau's comments, filed January 9, 1973; (b) reply to (a) by Hunt, filed January 19, 1973; (c) opposition by Lexington County, filed February 1, 1973; and (d) reply to (c) by Hunt, filed February 13, 1973.

[3] Initially, petitioner requested these logs in a motion for the production of documents, filed September 1, 1972. Their production was ordered by the Administrative Law Judge in an oral Order issued October 25, 1972. A petition by Lexington County for leave to appeal or modify that Order was denied by Memorandum Opinion and Order, FCC 72M–1401, released November 10, 1972.

tion should be accepted and considered on its merits for the reasons set forth by petitioner and also because of the public interest considerations underlying the allegations in the petition. Lexington County opposes the petition, arguing that good cause does not exist for its acceptance because the petition is predicated upon information that was available to petitioner before the period specified by Section 1.229 (b) of the Rules expired. In reply, Hunt acknowledges that some of the information contained in his petition was available prior to the expiration of the time for filing the instant request, but contends that the program logs provide evidence necessary to support his petition. The Board believes that the data contained in the program logs is essential to petitioner's request.[4] Though untimely, the request was filed within a reasonable time after petitioner obtained WCAY's program logs. In these circumstances, good cause exists for consideration of the petition on the merits. *Cf. United Television Co., Inc.* (*WFAN–TV*), 33 FCC 2d 424, 23 RR 2d 644 (7972); *Folkways Broadcasting Co., Inc.*, 27 FCC 2d 619, 21 RR 2d 163 (1971).

MISREPRESENTATION OF COMMERCIALIZATION AND NEWS PRACTICES

3. In support of petitioner's request for the addition of an issue to determine whether Lexington County made misrepresentations to the Commission regarding its commercialization practices, Hunt asserts that copies of WCAY program logs[5] and tape transcriptions of WCAY programming in 1972[6] reveal discrepancies between the station's promises regarding its commercial practices and its performance. Petitioner notes that Lexington County proposed in WCAY's 1969 license renewal application to restrict its commercial broadcasting for the 1969–72 period to a maximum of 30% of its broadcast time between 6:00 A.M. and 6:00 P.M., and 25% during all broadcast hours. Petitioner maintains that Lexington County stated in this application that it would not exceed its proposed maximum level of commercialization of 22 minutes an hour and that excesses would not occur during any more than 5% of the hours in any week. Petitioner contends that, in spite of this representation, WCAY engaged in excessive commercialization on six of the 12 days for which it had program logs during this renewal period. Specifically, Hunt contends that WCAY broadcast more than 18 commercial minutes per hour during 21 one-hour broadcast periods between 6:00 A.M. and 6:00 P.M., which represents 13.2% of the hourly segments in the logs for this period. Hunt contends, moreover, that WCAY broadcast more than 20 minutes of commercials during eight of these 21 one-hour segments, and more than 22 minutes during one of these segments. In addition, petitioner asserts, tape recordings of WCAY's programming during specified dates in 1972 disclose that WCAY broadcast in excess of 18 minutes of commercials during five one-hour segments, four of these containing in excess of 22

[4] See paras. 3 and 8, *infra*.

[5] The WCAY program logs upon which Hunt bases the arguments in his petition are the composite week logs from 1967 to 1971, consisting of fourteen days of program logs in 1967–1969, and twelve days of program logs in 1970 and 1971. However, petitioner only submitted two days of program logs with his enlargement request.

[6] The recorded portions of WCAY programming, transcripts of which were attached to the petition along with a supporting affidavit, were recorded on June 30 and July 6, 7 and 22, 1972.

commercial minutes. Regarding WCAY's 1966–69 renewal period, petitioner notes that Lexington County proposed in WCAY's 1966 renewal application to broadcast commercial matter during only 31.7% of all broadcast hours and that the applicant had stated that the maximum amount of commercial matter WCAY would broadcast in any one-hour segment would be 19 minutes. However, Hunt contends, the program logs in his possession reveal that during this period WCAY broadcast more than 19 commercial minutes during 31 one-hour segments. In addition, petitioner contends, nine of these hourly segments contained more than 22 minutes of commercial broadcasts. In support of his request regarding the purported misrepresentation by Lexington County of WCAY's news broadcasting, petitioner notes that Lexington County proposed during WCAY's 1969–72 renewal period to devote 15% of WCAY's news to matters local in content, and that it proposed to devote during WCAY's 1966–69 renewal period one-half of the total news coverage to local and regional news. Petitioner maintains that, in spite of these representations, there is no indication from the program logs in Hunt's possession that any local or regional news was broadcast by WCAY during this period.

4. The Broadcast Bureau supports addition of the requested issues conditioned upon Hunt's submission of all the logs in his possession together with an affidavit of a person who has examined them. As additional support for enlargement, the Bureau notes that, in a letter dated November 8, 1972, the Commission requested a full explanation from Lexington County of discrepancies between Station WCAY's proposed commercial policy and the station's practices which were revealed in its 1972 renewal application. In reply, Hunt submits a copy of all WCAY program logs in his possession as well as a supporting affidavit. The affidavit modifies slightly the original allegations, stating that the WCAY program log of September 12, 1967, indicates that 8½ minutes of local news was broadcast that day.

5. In opposition, Lexington County contends that the affidavits which were furnished by petitioner do not satisfy the requirements of Rule 1.229(c) because they only verify the accuracy of the transcription of WCAY program recordings and not the tapes themselves. With specific regard to alleged overcommercialization, Lexington County contends that spot checks of one of the daily program logs relied upon by petitioner (December 13, 1968) reveal five errors in petitioner's calculations of commercial time broadcast by WCAY. Furthermore, Lexington County contends that there were only occasional departures from its "self-imposed" hourly commercial limits; that it stayed well within the bounds of its overall commercial limits;[7] that it has disclosed to the Commission all variances between its commercial broadcast proposals and its actual performance during the composite week; that its commercial policy was adopted in good faith and modified only when necessary to serve the public interest by providing local mer-

[7] In this regard, Lexington County contends that it proposed in the WCAY renewal applications to limit broadcast of commercials during WCAY's 1966 renewal period to no more than 31.7% of the station's total programming each week, and to no more than 30% of the weekly programming during the 1969 renewal period. Lexington County maintains that composite week figures for 1969 and 1972 indicate that for the earlier period only 16.5% of WCAY's total programming contained commercial matter, and that this rate rose to only 20.9% during the latter period.

chants an opportunity to promote sales when most advertising time had been purchased in advance; and that it has taken affirmative steps to eliminate any further departures from its hourly commercial limits.[8] Lexington County also denies that any misrepresentations were made in WCAY's 1966 and 1969 renewal applications in connection with the amount of local and regional news it intended to broadcast. Lexington County maintains that the 15% figure in WCAY's 1969 renewal application represents an estimate of the amount of local news broadcast during the 1966–69 period, not an estimate of local and regional news to be carried during the next renewal period. Furthermore, Lexington County contends that petitioner fails to take into account WCAY's broadcast of weather reports which may, it maintains, be classified as news. The general absence of separate logging notations, it asserts, results, not from the fact that the station did not cover such matter, but from the fact that past coverage of local and regional news was often interspersed in regularly scheduled programs.[9] Lexington County concludes that no misrepresentation issue is warranted.

6. In reply, Hunt asserts that there is no basis for the objection by Lexington County that petitioner has not furnished an affidavit verifying the accuracy of the tapes when it is apparent from the tapes themselves that they are recordings of WCAY programming, and when the transcripts of the tapes have been verified. Furthermore, petitioner contends, calculations by Lexington County of its commerical broadcasts on December 13, 1968, were erroneous because they failed to account for the commercials broadcast during the network news programs which WCAY aired.[10] Petitioner disputes Lexington County's argument that WCAY stayed well within the bounds of its overall commercial limits since Lexington County's promises in its renewal applications were framed in terms of the amount of advertising to be broadcast in each one-hour segment. Petitioner also argues that Lexington County does not adequately explain in its opposition the absence of notations in its program logs indicating the broadcast of local and regional news and notes that Lexington County's assertions concerning its practice of interspersing local and regional news in other programs was made without specifying the frequency of such broadcasts. Finally, petitioner contends, Lexington County fails to provide supporting affidavits from persons who provide the station with the "Hot-Line" phone tips.

7. In the opinion of the Review Board, although Hunt has adequately verified the materials underlying the allegations in the petition, he has not raised a substantial question of misrepresentation by Lexington County of WCAY's commercialization and news broadcast practices. With respect to commercialization, the Board finds no support for Hunt's allegations that statements made in WCAY's renewal

[8] In an affidavit attached to the opposition, J. Olin Tice, Jr., president of Lexington County, states that Lexington County proposed a more flexible commercialization proposal in WCAY's 1972 renewal application in order to avoid miscalculations in the future.

[9] Lexington County contends that WCAY periodically broadcasts telephone reports from the Cayce police and fire departments and "Hot-Line" phone tips from listeners. Lexington County also submits that two regular broadcast programs, ***Bulletin Board*** and ***Lexington Show***, often cover material "readily classifiable" as news.

[10] Petitioner attaches to his pleading Exhibit 6 of WCAY's 1969 renewal application consisting of the Mutual Network logs for the 1968 composite week, and contends that these logs reveal that 1½ to 2 minutes of commercials were broadcast during each network news broadcast.

applications concerning such practices were intended to mislead the Commission. Lexington County disclaims such intent and the affidavit of its president explains the variations between the proposed and actual amounts of commerical time in terms of errors in judgment, as well as the need to modify its proposals in order to serve its community. This explanation is not inherently improbable and any intent to misrepresent is further belied by the fact that WCAY operated well within its overall commercial limits. In these circumstances, we will not add a misrepresentation of commercialization practices issue. See *Southern Broadcasting Co.* (*WGHP–TV*), 31 FCC 2d 661, 22 RR 2d 929 (1971). *Cf. Chicago Federation of Labor and Industrial Union Council*, 38 FCC 2d 417, 25 RR 2d 1147 (1972). Likewise, Hunt has not adequately substantiated his claim that the news estimates contained in WCAY's renewal applications represented wilfull misstatements of the licensee's intentions. However, the apparent variances between the amounts of local and regional news and the amounts of commercial matter promised in the applications, and that actually programmed, are significant and raise a serious question as to the reliability of Lexington County's present proposal. While a licensee's prerogative to exercise flexibility and discretion in its programming is well established, a licensee retains the duty to substantially carry out the programming policies embodied in its renewal proposal or, in the alternative, justify substantial variations to the Commission. *KORK, Inc.*, 31 FCC 85, 21 RR 781 (1961). Such justification is not present here. Although Lexington County asserts that WCAY has remained faithful to its news programming proposals contained in these renewal applications, it has not specifically shown that WCAY's programming logs support its position or that WCAY has carried the percentages of local and regional news it proposed. Moreover, whether the statement made by Lexington County in its 1969 renewal application concerning news broadcasts was intended as a proposal for programming during the renewal period or as a comment concerning WCAY's performance during 1966–1969 is unclear and must be explored at the hearing as well. Finally, Lexington County concedes that it broadcast more commercial matter than it had proposed, and in some instances the amount of commerical matter broadcast substantially exceeded the specific amount proposed. While neither the alleged discrepancy in local news nor commercial matter, standing alone, would be sufficient to raise a substantial question as to Lexington County's qualifications, the Board is of the view that, considered together, they do raise such a question thereby warranting an evidentiary inquiry. Therefore, the Board will add an issue to determine whether the Commission can rely upon Lexington County to operate the FM station as proposed. See *Southern Broadcasting Co.* (*WGHP–TV*), 26 FCC 2d 998, 20 RR 2d 689 (1970); *Regal Broadcasting Corp.* (*WHRL–FM*), 14 FCC 2d 845, 14 RR 2d 407 (1968).

FAIRNESS DOCTRINE AND PERSONAL ATTACK RULE VIOLATIONS

8. In support of his request for the addition of an issue to determine whether Lexington County has complied with the fairness doctrine and personal attack rule in connection with the operation of Station

WCAY, petitioner cites portions of four WCAY broadcasts recorded during June and July, 1972, which dealt with capital punishment, the food stamp program, proposals for the value-added tax, and the flying of the Confederate flag.[11] Petitioner contends that only one side of each of these "plainly controversial" topics was ever presented, and notes that none of the WCAY program logs in his possession contain any indication that discussion programs or editorials were ever broadcast by WCAY which may have presented opposing viewpoints. Petitioner concludes that "[w]hile it is not within Hunt's power to establish conclusively that WCAY never broadcast any viewpoints opposing those of Mr. Dekel's on controversial issues, nonetheless, the logs and tapes in his possession serve as an adequate threshold demonstration that Lexington has violated its Fairness obligation." The alleged personal attack violation arose, petitioner contends, out of WCAY's failure to comply with Section 73.123(a) of the Commission's Rules [12] following a comment made by Mr. Dekel during the broadcast of the program concerning the flying of the Confederate flag in which he referred to the American Civil Liberties Union (ACLU), as a "known Communist outfit" having "Communist ties" going back many years. In support, petitioner furnishes a copy of an affidavit signed by the president and the executive secretary of the ACLU of South Carolina stating that that organization has not received a transcript of the statements allegedly made during the broadcast or an offer to respond to those statements.

9. The Bureau contends that petitioner has not adequately established that Lexington County violated the fairness doctrine, even if it is assumed that the four broadcasts cited dealt with controversial issues of public importance. The Bureau notes that the logs relied upon by petitioner to show that WCAY had only presented one side of controversial issues of public importance predate the broadcasts referred to in the petition by more than a year; and, even if petitioner had program logs for the periods subsequent to the broadcasts, nothing in these logs would indicate whether WCAY ever presented views contrasting Mr. Dekel's. The Bureau contends that the fairness doctrine only requires that the licensee offer a reasonable opportunity for presentation of contrasting views and that there is evidence from the transcripts of WCAY recordings of at least one such offer being made. Regarding the alleged broadcast of the personal attack, the Bureau argues that, even if WCAY did not comply with the personal attack rule, the addition of an issue would be unwarranted because petitioner fails to show that the attack was more than an isolated incident. Lexington County agrees with the Bureau and adds that it has never received complaints that WCAY's programming on any issue was one-sided and unfair. Furthermore, Lexington County contends, it is its policy to make time available to responsible spokesmen to express views on the air opposing those of Station WCAY and that such offers have

[11] The broadcasts petitioner refers to were part of the "Friendly Ben Show" hosted by Mr. Ben Dekel every weekday from 6–9 A.M. on WCAY.

[12] Section 73.123(a) of the Rules provides that if a personal attack is made during presentation of views on a controversial issue of public importance, the licensee shall within one week thereof notify the person so attacked of the date, time and identification of the broadcast, provide a script or tape of the attack, and offer a reasonable opportunity to respond over the licensee's facilities.

been made on the "Friendly Ben Show." Lexington County also states that the WCAY management was totally unaware of the purported personal attack at the time it allegedly occurred and that the WCAY staff "has been warned that any violation of Rule 73.123 is cause for dismissal."

10. In reply to the Bureau, petitioner maintains that adoption of the Bureau's position would excuse Lexington County's "shadow compliance" with the fairness doctrine and would significantly dilute that doctrine. Hunt maintains that, by using the only means available at his disposal (WCAY program logs) to document his allegations, he has made a sufficient showing to warrant the addition of the requested issue, and that it would be unfair to require petitioner to prove with certainty that WCAY never presented contrasting views. Petitioner also contends that the alleged personal attack broadcast by WCAY should not be considered as an isolated incident because the personal attack rule is a part of the fairness doctrine, which petitioner maintains Lexington County has also violated. In response to Lexington County, Hunt submits copies of three complaints which the Commission has received concerning Station WCAY and contends that these complaints demonstrate that WCAY makes no provision for the broadcast of opposing views.[13] Petitioner also maintains that it "defies common sense" to think that the only instance of a personal attack broadcast on WCAY occurred during the short time when Hunt monitored the station's programming, and that it may be presumed that other such attacks have occurred frequently. Finally, petitioner argues that Ben Dekel's invitations for contrasting viewpoints "effectively intimidates the public and chills any desire to oppose Mr. Dekel on his own program * * *."

11. The Review Board will not add an issue to determine whether Lexington County has complied with the fairness doctrine and personal attack rule in connection with WCAY's operation. First, petitioner's showing that WCAY has presented only one side of controversial issues of public importance is inadequate. Although broadcasters are required to provide a reasonable opportunity for each side of such issues to be presented, the Commission requires the complainant, *inter alia*, to set forth reasonable grounds for concluding that the licensee in his *overall programming* has not attempted to present opposing views on the issues presented. *Applicability of the Fairness Doctrine in Handling of Controversial Issues of Public Importance*, 40 FCC 598, 2 RR 2d 1901 (1964). It is the policy of the Commission that fairness doctrine complainants assume the burden of coming forward with evidence which will show a basis for the complaint. *The Meredith Corp.*, 37 FCC 2d 551, 25 RR 2d 428 (1972); *Federation of Citizens Association of the District of Columbia*, 21 FCC 2d 12, 17 RR 2d 1113 (1969). Here, petitioner's attempt to show that WCAY did not include in its programming views opposing those presented on the "Friendly Ben Show", and did not afford the opportunity for the pres-

[13] All three complaints concerned the "Friendly Ben Show". The first concerned a broadcast purportedly racist in content which the complainant found offensive; the second concerned WCAY's failure to air a public service announcement prepared by a federal agency; and the third concerned broadcasts allegedly encouraging disobedience to laws.

entation of opposing views on that or other shows, is insufficient to justify the addition of the issue. There is no substantiation or logic to the charge that offers made during the "Friendly Ben Show" inviting contrasting views were in fact intimidating, nor is there any evidence from the three complaints attached to petitioner's reply pleading to show that WCAY does not broadcast opposing views. With regard to the alleged personal attack, even accepting that such a personal attack was made against the ACLU during a WCAY broadcast, and although there is no indication that WCAY complied with the provisions of Section 73.123(a) of the Rules afterwards, petitioner has failed to substantiate his contention that "other such attacks have frequently occurred." Because there is no indication that the violation was anything other than an isolated incident, and in light of the fact that Lexington County has warned the staff of WCAY that such acts are grounds for their dismissal, the addition of this issue is not warranted.[14] *Cf. Regal Broadcasting Corp.*, 27 FCC 2d (694, 21 RR 2d 61 (1971).

12. Accordingly, it is ordered, That the petition to enlarge issues, filed December 11, 1972, by William D. Hunt, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

13. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following:

To determine the extent to which Station WCAY, Cayce, South Carolina, licensed to Lexington County Broadcasters, Inc. has in operation deviated from proposals made in its 1966 and 1969 renewal applications concerning its commercial and news practices and the effect of such deviation on the requisite and comparative qualifications of Lexington County Broadcasters, Inc. to be a Commission licensee.

14. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the issue added herein SHALL BE on Lexington County Broadcasters, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[14] The circumstances surrounding Lexington County's alleged violation of Section 73.123(a) of the Rules, however, may, upon a *prima facie* showing to the Judge of "unusually poor" past broadcast record, be investigated in connection with WCAY's past programming during the comparative phase of the hearing.

F.C.C. 73-528

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
PHILCO FORD CORP., BLUE BELL, PA.
For Waiver of the All-Channel Television Receiver Rules

MAY 16, 1973.

MR. D. B. BLENKO,
Associate Counsel,
Philco Ford Corp.,
Union Meeting Road,
Blue Bell, Pa. 19422

DEAR MR. BLENKO: This is in response to your letter of December 14, 1972 and subsequent correspondence concerning waiver of the all-channel television receiver rules to permit shipment of a television receiver specifically designed for use in hospitals, hotels, motels and educational institutions.

The receiver in question is equipped with UHF and VHF tuning systems which are comparable in all respects, except that the VHF tuner is remotable and the UHF tuner is not. It would be used only where remote control capability is desired, where the hospital, hotel, motel or educational institution is equipped with a VHF-only master antenna system, and where all available UHF and VHF channels can be tuned with the VHF tuning control. In such use, UHF signals are converted to VHF frequencies for transmission to the receiver, and stickers identifying the VHF channel numbers on which UHF channels are received are affixed by the manufacturer adjacent to the VHF tuning control.

The receiver would be installed in hospitals, hotels, motels and educational institutions by Telesound, a marketing division of Philco-Ford. In almost all cases, they would be leased to the institution for a minimum period of five years, and returned to Philco-Telesound at the end of the lease. In a small number of cases, the institution initially purchases the receivers or exercises an option to purchase either during or at the end of the term of the lease, pursuant to a purchase option provision contained in most leases. When the institution does purchase the receiver, it agrees that it will not resell to a third party without providing to Philco-Telesound the option either to repurchase the sets or to rework the sets as required to achieve compliance with F.C.C. regulations prior to resale. Reworking the receiver involves connecting VHF and UHF antennas, reconnecting leads to certain of the on-set controls, and either removing or disabling the motor which drove the VHF tuner in remote control operation. Philco-Telesound would, in addition, agree to rework at its own

expense any receiver covered by the waiver which was found at any time to be operating in contravention of the Commission's regulations.

When the above-described receiver is used with a VHF-only master antenna system in the manner described, there is no disparity between UHF and VHF receiving capability. When it is reworked by Philco in the above-described manner and used apart from the master antenna system, there is also no disparity between UHF and VHF receiving capability. Thus, grant of the request for waiver would not adversely affect the audience potential of present or future UHF stations. A grant of the request would, in addition, result in manufacturing economies, which should accrue to the benefit of hospitals, hotels, motels and educational institutions. The waiver request is therefore granted, subject to the conditions specified below.

This receiver model should be certificated in the normal manner. The application for certification should identify the receiver as a special purpose model, should include a copy of this letter, and should contain a statement that use of the receiver will be in accord with the provisions of this letter. It should also include a statement that the following information will be submitted to the Commission's Office of Chief Engineer in writing prior to each installation:

1. The name and address of the hospital, hotel, motel or educational institution in which the receivers are to be installed.

2. The model number of the receiver.

3. A statement that the receiver will be connected to a VHF-only master antenna system and that all UHF and VHF TV signals in the area will be carried on that system.

4. A statement that the manufacturer has taken steps by way of contract to adequately assure that receivers used apart from the master antenna system will first be reworked by the manufacturer to assure that their operation apart from the system is fully in accord with F.C.C. regulations.

Commissioner Wiley concurring.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73–712

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
CONSIDERATION OF THE OPERATION OF, AND POSSIBLE CHANGES IN, THE "PRIME TIME ACCESS RULE", SECTION 73.658(k) OF THE COMMISSION'S RULES	
Petitions of:	Docket No. 19622
NATIONAL BROADCASTING CO., INC. (NBC)	RM–1967
MIDLAND TELEVISION CORP., KMTC, SPRINGFIELD, MO.	RM–1935
	RM–1940
KINGSTIP COMMUNICATIONS, INC., KHFI–TV, AUSTIN, TEX.	RM–1929
For Deletion of the Rule	
MCA, INC.	
To Permit Use of "Off-Network" Material Plus 25 Percent New Material	

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 5, 1973)

BY THE COMMISSION: COMMISSIONERS ROBERT E. LEE, JOHNSON, H. REX LEE AND HOOKS CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Modification of Issues Specified in Notice of Oral Argument" filed on June 26, 1973, by Westinghouse Broadcasting Company, Inc. (Group W). The Commission issued a Notice of Oral Argument, FCC 73–657, June 18, 1973, which set the above captioned proceeding for oral argument on July 30 and 31, 1973. This proceeding is an inquiry into and proposed rule-making for the prime time access rule, Section 73.658(k) of the Commission's Rules. Group W, by its Petition, seeks to expand the topics specified in the Notice.

2. The Petition for Modification states that the Notice designates only two topics for special consideration in the oral argument: The impact of the prime time access rule on U.S. program production activity and employment (including the extent to which such impact is a relevant consideration for the Commission); and data as to the number and types of syndicated and local programs which are likely to be aired on stations during the 1973–74 broadcast year and in the future. While the Notice doesn't specifically limit the topics to be considered in the oral argument, Group W argues that the designation of these two issues as topics of special concern is bound to discourage full discussion of other, more important topics. Group W asks the Commission to expand the topics now specified in the Notice as topics for special consideration in both oral argument and in fur-

ther written comment to include two additional subjects. These are: (1) The effect that repeal of the rule would have on the Commission's efforts to reestablish licensee individuality and responsibility as operable factors in television broadcasting. (2) If the rule is repealed, what alternatives should be considered to deal with the effects of network domination which were found to exist in Docket No. 12782.

DISCUSSION AND CONCLUSIONS

3. Upon consideration of this submission we are of the view that this is an unnecessary petition and should be denied. In paragraph 3 of the Notice of Oral Argument we said "[t]he Commission is not specifying the subjects to which discussion is to be limited. *We call attention to* two areas which we *hope* will be covered." (emphasis added) The Notice then mentioned the two areas which Group W says we are limiting ourselves to. Again, in the same paragraph, we further stated "the Commission in its decision herein is free to consider, and parties may wish to discuss, a wide range of alternatives, from leaving the rule essentially *as is* with minor changes, to repeal, and of course including various 'in-between' approaches." Thus, the Notice is by no means as limiting as maintained by Group W. In addition, the above quoted portions of the Notice invite discussion on the very areas into which the Group W Petition would now have us expand.

4. In view of the foregoing, the "Petition for Modification of Issues Specified in Notice of Oral Argument" filed on June 26, 1973 by Westinghouse Broadcasting Company, Inc. (Group W) seeking expansion of the topics specified in the Commission's "Notice of Oral Argument", IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 73R-249

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
RKO GENERAL, INC. (WNAC-TV), BOSTON, MASS.	Docket No. 18759 File No. BRCT-63
For Renewal of Broadcast License	
COMMUNITY BROADCASTING OF BOSTON, INC., BOSTON, MASS.	Docket No. 18760 File No. BPCT-4198
THE DUDLEY STATION CORP., BOSTON, MASS.	Docket No. 18761 File No. BPCT-4277
For Construction Permit for New Television Broadcast Station	

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 6, 1973)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. This proceeding involves the mutually exclusive applications of RKO General, Inc., for renewal of license for Station WNAC-TV, Channel 7, Boston, Massachusetts, and those of Community Broadcasting of Boston, Inc. (Community) and The Dudley Station Corporation (Dudley) for authorization to construct a new television broadcast station on the same channel in the same community. Now before the Review Board is a petition to enlarge issues, filed February 5, 1973, by Dudley,[1] requesting the addition of various issues inquiring into the qualifications of Community.[2]

[1] Also before the Board are: (a) opposition, filed February 28, 1973, by Community; (b) comments of the Broadcast Bureau, filed February 28, 1973; and (c) reply, filed March 12, 1973, by Dudley.

[2] Dudley seeks addition of the following issues against Community:

(1) To determine whether Thomas Theodore Jones failed to make timely disclosure of material information to the Commission as required by Section 1.65, Section 1.514(a), and Section 1.615 of the Commission Rules and Regulations in:

(a) Ownership Reports for Station WCRB, WCRB-FM, and WCRX;

(b) an application requesting assignment of license of WCRX(FM);

(c) the above-captioned application of Community Broadcasting of Boston, Inc.

(2) To determine whether Thomas Theodore Jones, as a principal of Community Broadcasting of Boston, Inc. has been negligent, careless, or inept either in the operation of Stations WCRB, WCRB-FM, Waltham, Massachusetts, and WCRX, Springfield, Massachusetts, or in this proceeding.

(3) To determine whether Community Broadcasting of Boston, Inc., should be disqualified, or assessed a comparative demerit for failure to make timely disclosure concerning business interests of Stephen P. Mugar, as required by Section 1.65 and Section 1.514(a) of the Commission's Rules and Regulations.

(4) To determine whether Community Broadcasting of Boston, Inc., has been careless or inept in reporting material information to the Commission as required by Sections 1.65 and 1.514(a) of the Commission's Rules and Regulations.

(5) To determine, in light of the evidence adduced pursuant to the foregoing issue, the effect on the basic and/or comparative qualifications of Community Broadcasting of Boston, Inc., to be a Commission licensee.

ISSUES INVOLVING THOMAS T. JONES

2. The issues requested by Dudley concern two Community principals: Thomas T. Jones, a 5% stockholder, and Stephen P. Mugar, a

6.6% stockholder. Essentially, Dudley alleges that Jones, who proposes to serve as the full-time Director of Community Relations for Community's proposed station, is an experienced broadcaster who has violated the Commission's rules and regulations on numerous occasions in the past. At present, Jones is the President, director and 45% stockholder (50.6% voting interest) in the Charles River Broadcasting Company (Charles River), the licensee of Stations WCRB and WCRB–FM, Waltham, Massachusetts. Charles River wholly owned WCRX(FM), Springfield, Massachusetts, until August 29, 1972, and WCRQ(FM) Providence, Rhode Island, until April, 1968. In addition, from 1962 through March, 1972, Jones was a stockholder, director and president of Charles River Civic Television, Inc., an applicant for a construction permit for a television station to operate on Channel 5 in Boston, Massachusetts. See *WHDH, Inc.*, 16 FCC 2d 1, 15 RR 2d 411, released January 23, 1969.

3. Specifically, Dudley alleges the following: (a) that the Presiding Judge in the *WHDH* case [3] found that Jones had filed a "false application" for WCRB through negligence and then failed to correct the application when he became aware of this error in violation of Sections 1.514 [4] and 1.65 [5] of the Commission's Rules; (b) that Charles River changed corporate officers in September of 1971, but did not report these changes until January 3, 1972, in violation of Section 1.615 [6] of the Rules; (c) that Jones filed an application for consent to assignment of WCRX(FM) on March 3, 1972, acquired his interest in Community on March 27, 1972, and neglected to amend the WCRX (FM) assignment application to reflect his interest in Community in violation of Section 1.514 of the Rules; (d) that Community failed to list Jones' past interest in WCRQ(FM), Providence, Rhode Island, when it amended its application in March, 1972, listing Jones as a principal, in violation of Section 1.514 of the Rules; (e) that Jones failed to keep the WCRB 1972 renewal application up-to-date by failing to advise the Commission of the disposition of a sex-discrimination complaint, in violation of Section 1.65 of the Rules; and (f) that Charles River misclassified some "entertainment" programming, as "instructional" in the 1966, 1969 and 1972 renewal applications for WCRB, WCRB–FM and WCRX(FM) and was notified by the Commission of this error in 1969 and again in 1972. In light of these allegations, Dudley requests that appropriate issues be added against Community.

4. In opposition, Community argues that Dudley's petition is grossly untimely and that all the violations alleged by Dudley are of minor significance since Jones is only a five-percent stockholder, not an officer or director, and will have no decision making role in the day-to-day operation of Community's proposed station. Community states that the Presiding Judge in the *WHDH* case concluded that the record was not sufficient ". . . to permit ascribing to Mr. Jones more than miscon-

[3] Initial Decision, 16 FCC 2d 29, released August 15, 1966.
[4] Section 1.514(a) requires that each application shall include all information called for by the particular form on which the application is filed.
[5] Section 1.65 requires that an applicant amend its application when the information furnished in the application is no longer substantially accurate and complete in all significant respects.
[6] Section 1.615 requires, *inter alia*, that each licensee shall file a supplemental Ownership Report, FCC Form 323, within 30 days of a change in corporate directors or officers

struction of his responsibilities" (16 FCC 2d at 253); that Jones was only two and one-half months late in notifying the Commission of the change in Charles River's corporate officers; and that Jones' failure to amend the WCRX(FM) assignment application to reflect the acquisition of Community stock is of minor significance since it would have had no effect on the Commission's disposition of the assignment application. Community further states that it will amend its application to report Jones' past interest in WCRQ(FM), but did not do so earlier since Jones felt that this past interest need not be reported;[7] and that Charles River did advise the Commission of the disposition of a sex-discrimination complaint by letter dated February 23, 1972, a copy of which is attached to Community's opposition. With respect to the allegation of improper logging, Community notes that the Commission took no action against Charles River, and alleges that the logging of one of the programs in question was "approved" by counsel.[8] The Broadcast Bureau also opposes Dudley's petition, arguing that the allegations with respect to Jones' participation in the *WHDH* case, his failure to update the WCRB, WCRB–FM and WCRX(FM) Ownership Reports, and his failure to update the WCRX(FM) assignment application are all grossly untimely. However, the Bureau states that it "would not oppose" limited enlargement of the issues on a comparative basis only.

5. The Review Board believes that all of the requested issues relating to Theodore Jones' past broadcast activities should be denied. First, we believe that Dudley's allegations are grossly untimely and not supported by a showing of good cause for the delay. Jones became a shareholder in Community in March of 1972, but Dudley did not seek to enlarge issues with respect to Jones' past broadcast record until February of 1973, approximately eleven months later, although the information upon which Dudley's allegations are based has been a matter of Commission record for months and, in some cases, even years. Dudley's sole explanation for the delay in filing the instant motion, *i.e.*, counsel's heavy work load, is totally inadequate to account for the gross untimeliness of these allegations. *Cf. Dowrie Broadcasting Co., Inc.*, 37 FCC 2d 628, 25 RR 2d 576 (1972). Second, we do not believe that Dudley's allegations raise serious public interest questions sufficient to satisfy the test established in *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 8 RR 2d 611 (1966).[9]

6. In this regard, it appears that Charles River did, in fact, report the results of the sex-discrimination complaint to the Commission; that Charles River was merely reminded by the Commission in 1969 and again in 1972 to maintain proper logging procedures; and that the Presiding Judge in the *WHDH* case concluded that Jones had misconstrued his responsibilities and the Commission did not disturb this

[7] Community filed a petition for leave to amend its application on April 6, 1973, to report, *inter alia*, Jones' past interest in WCRQ(FM). This petition was granted by the Presiding Judge, by Order released May 25, 1973 (FCC 73M–617).

[8] In its letters to Charles River, the Commission took no action but advised the licensee to maintain its program logs in accordance with Commission requirements regarding the classification of programming.

[9] Petitioner argues that the Board, in this proceeding, has enlarged issues based on newly discovered evidence either from testimony or filings. However, we would point out that when the Board enlarged issues in this proceeding, the petitioning party had, in all cases, either established good cause or satisfied the *Edgefield-Saluda* test. See *e.g.*, 30 FCC 2d 138, 22 RR 2d 178, released June 7, 1971; and 40 FCC 2d 1014, 27 RR 2d 656, released May 11, 1973.

conclusion. With respect to the alleged reporting omissions, we do not believe that any of these allegations raise a substantial question which warrants exploration in hearing. See *Harvit Broadcasting Corp.*, 32 FCC 2d 656, 23 RR 2d 328 (1971); *Auburn Publishing Co.*, 34 FCC 2d 134, 24 RR 2d 29 (1972). Significantly, Charles River voluntarily reported the changes in its corporate officers and Jones' interest in Community was not decisionally significant with respect to Commission action on the WCRX(FM) assignment application. Community's failure to report Jones' past interest in WCRQ(FM)—which is the only allegation directly involving Community—is of questionable significance, and it does not appear that Community intentionally sought to withhold this information from the Commission. See *Harvit Broadcasting Corp.*, *supra*. In fact, Community has amended its application to reflect this interest (see note 7, *supra*).

7. Thus, the only matters of any substance cited by Dudley in support of an ineptness issue against Community are the late filing of Ownership Reports for WCRB, WCRB–FM and WCRX(FM), and Jones' failure to report his interest in Community in the WCRX(FM) assignment application, and they do not, in our view, establish a pattern of carelessness or inadvertence sufficient to warrant the addition of an ineptness issue against Community. See *Alvin L. Korngold*, 40 FCC 2d 536, 27 RR 2d 78 (1973), and cases cited therein. Significantly, Jones is only a five-percent shareholder in the Community application and the proposed Director of Community Relations; Jones is not, however, an officer or director, and according to Community, will play no part in the day-to-day decisionmaking process of the proposed station. This fact, together with Dudley's failure to demonstrate a pattern of ineptness or carelessness, convinces us that disqualifying issues should not be added against Community based on Jones' past broadcast record.[10]

ISSUE INVOLVING STEPHEN P. MUGAR

8. In support of its request for issues concerning Stephen Mugar, Dudley alleges that Mugar, a director and 6.6% stockholder in Community, invested $500,000 in Sages Complete Markets (Sages), San Bernardino, California, in the spring of 1972, and acquired an ownership interest in the enterprise sometime during the same period. Dudley further alleges that Community amended its application on October 20, 1972, to report that Mugar was a director and held an interest of 84.1% in Sages since May of 1972, and that Sages was involved in a bankruptcy proceeding. According to Dudley, Mugar returned the stock to Sages in November of 1972; Community amended its application again on December 18, 1972, to indicate that Chapter 11 bankruptcy proceedings had been instituted against Sages on May 19, 1972; and David Mugar, Stephen's son and president of Community, was aware of his father's activities in the spring of 1972. Based on the fore-

[10] Although we do not believe that disqualifying issues are warranted against Community, Jones' past broadcast record may be relevant under the standard comparative issue. However, a special issue is not required to explore the past broadcast record of an applicant in a comparative case. See *East St. Louis Broadcasting Co., Inc.*, 9 FCC 2d 212, 10 RR 2d 859 (1967). The past broadcast record of an applicant may be explored if there is a *prima facie* showing that that record is "unusually good" or "unusually poor."

going, Dudley requests that Rule 1.514, 1.65 and ineptness issues be specified against Community. Community, in its opposition, does not dispute Dudley's factual allegations, but opposes the addition of the requested issues. According to Community, Mugar testified at the hearing that he made an unsecured loan of $500,000 to Milton Sage, an old friend who was seriously injured in an automobile accident; that Sage insisted, at a later date, that Mugar take the stock even though the company was in a bankruptcy proceeding; and that Mugar paid $220 for the stock and then sold it back to Sage on December 31, 1972 for $3. Mugar, asserts Community, did not believe that the stock had any value, did not consider its purchase to be an investment, and, therefore, did not report its acquisition within 30 days. The Broadcast Bureau opposes the addition of the requested issues since no motive to conceal has been shown and Community itself brought the matter to the attention of the Commission.

9. The Board does not believe that this matter warrants further exploration in hearing and will deny the requested issues. Community voluntarily amended its application in October, 1972, and again in December, 1972, to report Mugar's connection with Sages; therefore, it does not appear that Community or Mugar intentionally sought to conceal these facts from the Commission.[11] It appears that Community's delay in reporting this information may have been due to Mugar's belief that the stock in Sages was not, in fact, an investment since the stock was nearly worthless. Moreover, the information Community failed to report within the thirty days required by Rule 1.65 is of questionable significance. *Cf. Harrit Broadcasting Corp., supra;* and *Auburn Publishing Co., supra.* Finally the requested ineptness issue will also be denied for failure to make the necessary showing. See *Alvin Korngold, supra.*

10. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed February 5, 1973, by the Dudley Station Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

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[11] In this connection, we agree with the Bureau that there is "no reason to enlarge on the importance of Stephen Mugar's participation in the Community application simply because his son is a rather more substantial figure in that application."

F.F.C. 73-713

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of SONDERLING BROADCASTING CORP., WGLD-FM, OAK PARK, ILL. Notice of Apparent Liability and Inquiry Into Alleged Broadcast and Cablecasts of Obscene, Indecent, or Profane Material by Licensees, Permittees, or Cable Operators	Docket No. 19716

MEMORANDUM OPINION AND ORDER

(Adopted July 3, 1973; Released July 6, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it an Application for Remission of Forfeiture and Petition for Reconsideration (hereinafter "Petition"), filed on May 11, 1973, as corrected and amended on May 14 and 18, 1973, on behalf of the Illinois Citizens Committee for Broadcasting (ICCB) and the Illinois Division of the American Civil Liberties Union,[1] asking that the Commission take the following actions: (1) remit a forfeiture of $2,000 assessed against Sonderling Broadcasting Co. for obscene and indecent broadcasts; (2) withdraw the Notice of Apparent Liability addressed to Sonderling (FCC 73-401); (3) terminate the "Inquiry Into Alleged Broadcasts and Cablecasts of Obscene, Indecent or Profane Material" (Docket No. 19716); (4) retract and disavow public remarks by Chairman Dean Burch regarding broadcasts of such material; and (5) acknowledge the right of the petitioners to intervene and participate in these proceedings. Also before the Commission is a letter to Chairman Burch from the American Civil Liberties Union, dated May 15, 1973, protesting the Commission's "incursion into the area of program content" and opposing the closed inquiry.[2]

2. For the reasons set forth below, we shall grant relief only to the extent that these pleadings will be treated as a request for clarification. (*Cf. Yale Broadcasting Co.* v. *FCC*, No. 71-1780, D.C. Circuit, January 5, 1973, *petition for cert. filed* May 4, 1973.) The purpose of this Order is to dispel the erroneous notion that the Commission, in instituting the Inquiry and assessing the Sonderling forfeiture, was intent on censoring all material dealing with sex off the air. (Petition

[1] The Petition originally named only ICCB as petitioner; the Illinois Division of ACLU was added in a Correction filed on May 14, 1973. An Addendum to the Petition was filed on May 18, 1973.

[2] The ACLU also asked that the Commission release the tape recordings its members heard before they initiated the Inquiry. The tape was released in *Media Access Project* (FCC 73-573), June 5, 1973, and is available for public inspection.

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at 20). In fact, our purpose in Sonderling was to impose an administrative sanction on a licensee who had violated the law, and our purpose in the Inquiry is to determine whether others have committed similar violations. The remarks by Chairman Burch were his personal views expressed in a speech, and did not constitute agency action which the full Commission can or should review.

I BACKGROUND

Relevant Commission actions

3. Section 1464 of the Criminal Code, 18 U.S.C. § 1464, prohibits the utterance of obscene, indecent or profane language by means of radio. The statute originated as part of Section 326 of the Communications Act of 1934 and was shifted to the criminal code in 1948 as part of a comprehensive revision of the federal criminal law.[3] The Commission has concurrent enforcement responsibilities with the Justice Department in matters arising under Section 1464. *Cf. FCC* v. *ABC*, 347 U.S. 284 (1954). In addition to the criminal penalties provided in the criminal code, violation of Section 1464 may result in administrative sanctions for Commission licensees. Thus, Congress has empowered the Commission to revoke licenses, 47 U.S.C. § 312(a), issue cease and desist orders, 47 U.S.C. § 312(b), or impose forfeitures, 47 U.S.C. § 503(b)(1)(E), for conduct which would be in violation of Section 1464.

4. Although numerous complaints alleging violations of Section 1464, by broadcast licensees have come to the Commission over the years investigations usually have not developed evidence which would warrant either administrative sanctions or criminal prosecution. Compare *Pacifica Foundation*, 36 FCC 147 (1964), with *WUHY–FM*, 24 FCC 2d 408 (1970). For the most part, self regulation within the industry [4] and good taste on the part of broadcast licensees have minimized abuses in this area.

5. In recent months, however, the Commission has received increasing numbers of complaints alleging that broadcast licensees and some cable operators have presented offensive program material.[5] A frequent subject of complaints has been the radio broadcast format known in the trade press as "topless radio," consisting of call-in talk shows in which masters of ceremonies discuss intimate sexual topics with

[3] *Gagliardo* v. *U.S.*, 366 F.2d 720, 723 (9th Cir. 1966). Section 326 of the Act, in turn, was derived from Section 27 of the Radio Act of 1927, 44 Stat. 1172.

[4] See, *e.g.*, National Association of Broadcasters, *The Television Code*, p. 5 (1972); National Association of Broadcasters, *The Radio Code*, p. 10 (1972).

[5] In the first 11 months of Fiscal 1973, the Complaints and Compliance Division received 31,084 complaints about allegedly obscene, indecent or profane program material. This compares with 2,141 in all of Fiscal 1972 and 1,180 in Fiscal 1971. Much of the increase is attributable to organized mailings, but much of it is not. In January and February of this year, for example, before the organized mailings became evident, the Division received 860 and 1,687 complaints, respectively. The complaints came from the public, from broadcast licensees and from Members of Congress who themselves had received numerous complaints from constituents. The Commission has been criticized by Congress in recent months for its performance in enforcing Section 1464. See, *e.g.*, oversight hearings on the Office of Telecommunications Policy, before the Senate Commerce Subcommittee on Communications, Feb. 20, 1973; FCC oversight hearings before the same subcommittee, Feb. 22, 1973; hearings before the House Appropriations Subcommittee on HUD-Space-Science-Veterans, March 14, 1973; hearings on renewal policy before the House Commerce Subcommittee on Communications and Power, March 14, 1973.

listeners, usually women. In reaction to these complaints, the Chief of the Complaints and Compliance Division in January first asked the Field Engineering Bureau to tape several programs in a number of cities in which the incidence of complaints was high. The Bureau was instructed to tape programs which had generated the most citizen complaints to local Commission field offices. These tapes along with several others which had been volunteered to the Commission by complainants provided the staff with approximately 61 hours of recorded programs from eight stations around the country.

6. Attorneys in the Complaints and Compliance Division reduced the 61 hours into a tape of about 22 minutes playing time. The staff on March 21 played the tape for the Commissioner,[6] along with an 11-minute segment which included an on-the-air conversation between a "topless radio" master of ceremonies and a woman who had called in to complain about the program. After hearing the tapes, the Commission instructed the staff to prepare a Notice of Apparent Liability for violation of Section 1464 against Sonderling Broadcasting Corp., licensee of WGLD–FM, Oak Park, Ill., one of the stations that had been recorded.

7. On March 27, the Commission released its Order directing initiation of the Inquiry, pursuant to Section 403 of the Act, 47 U.S.C. § 403, to determine whether licensees or cable operators are violating Section 1464 or related Commission rules, and, if so, to what extent. The Inquiry was ordered to be nonpublic in keeping with our normal practice for Section 403 proceedings, and the Commission's subpoena powers were delegated to the Chief Administrative Law Judge to permit the compelling of testimony and records in aid of the investigation.[7] Although initiation of the Inquiry followed the playing of the tape, the tape was not the basis for that action. The Commission had been made well aware of the mounting concern about allegedly obscene programming, and the Inquiry Notice would have issued even if the tape had not been compiled and played.[8]

8. On April 11, the Commission sent the Notice of Apparent Liability to Sonderling Broadcasting Corp. (FCC 73–401), setting forth in detail the language complained of and stating the legal basis for apparent liability.[9] The assessment was set at $2,000. The Notice informed the licensee that he could (1) pay the forfeiture, (2) file a statement as to why he should not be held liable or why the amount should be smaller, or (3) await action by the Commission to impose and collect the assessment.

9. By letter dated May 3, Sonderling denied liability, but enclosed in his letter a check for $2,000. By letter dated May 31, the chief of the

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[6] Commissioner Johnson declined to listen to the tapes for reasons stated in his dissenting opinion in *Sonderling*.

[7] The Chairman's March 28 speech to the NAB on sex-oriented broadcasts fits into the chronology at this point. It followed by one day the adoption of a resolution by the NAB board of directors, deploring and condemning "tasteless and vulgar program content." Neither of these developments was a Commission action, however. The fact that the text of the Chairman's speech was released through the Commission's Press Office does not raise the speech to the status of an official action. Speeches by Commissioners are routinely released by the Press Office when the Commissioners furnish the office with copies.

[8] See footnote 5, *supra*. We point out that the Inquiry embraces television and cable program material as well as radio, whereas the tape concerns only a handful of radio stations.

[9] Commissioner Johnson dissented from the action, and Commissioner Hooks issued a concurring statement.

Commission's Complaints and Compliance Division accepted the check and pointed out that, under Section 1.621(a)(1) of the rules, 47 C.F.R. § 1.621(a)(1), payment is considered an admission of liability.

II. THE PETITIONS

10. The Petition filed by ICCB and the Illinois ACLU seeks relief "on behalf of the thousands of Chicago area residents who have expressed, both to the Commission [10] and to ICCB, dissatisfaction with the effect upon WGLD's programming and, therefore, upon the listening alternatives available to residents of metropolitan Chicago, deriving from the instant proceedings." It asserts that ICCB and the Illinois ACLU have members who live within the contours of WGLD's signal. The Petition concludes that these groups, representing listeners of WGLD, have "at least as great an interest as any broadcaster in asserting these rights," citing language from *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969):

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

11. The thrust of both the Petition and the ACLU letter is that the Commission's actions have violated the rights of listeners to hear a diversity of information and opinion. They cite the following as examples of the "chilling effect" of these actions: (1) Sonderling's cancellation of its sex-talk program; (2) Storer Broadcasting Company's reported change in the format of the "Bill Ballance Show," the most widely heard of the sex-talk programs, whereby "intimate topics" will be forbidden; and (3) the NAB resolution of March 27 condemning and deploring "tasteless and vulgar program content." The specific injury to listeners of WGLD, it is asserted, has been to deprive them of "exposure to speech and ideas about important issues, thereby abridging their First Amendment rights to receive 'free speech by radio.'"

III. CLARIFICATION

12. The Petition raises difficult procedural problems which in the ordinary case might cause us to dismiss without reaching the merits. First, we do not believe that the Chairman's speech is an action reviewable by the Commission, and it is even more doubtful that it would be a good policy either to endorse or disavow the public remarks of individual members. Second, it is not at all clear whether anyone other than the party assessed has standing to seek remission or reconsideration of a forfeiture.[11] The Petitioners' complaint, however, is not so much with either of these specific occurrences as with what they characterize as a pattern of action by the Commission which they say has

[10] The Commission has received nowhere near "thousands" of protests against its Sonderling action. As of the drafting of this order, the Commission had received only four letters protesting the action, and two of those were from a newspaper publisher in Wisconsin.

[11] The legislative history of the forfeiture statutes, 47 U.S.C. §§ 503–504, indicates that Congress envisioned remission and mitigation only at the request of the licensee against whom the forfeiture was assessed. The Senate report on the 1960 amendments to the Communications Act states that forfeitures "may be remitted or mitigated by the Commission upon application of the licensee." S. Rep. No. 1957, 86th Cong., 2d Sess. 5 (1960). The statute provides for a trial *de novo* in the district court as the means of recovering forfeitures. 47 U.S.C. § 504(a).

chilled controversial programming. While we will not grant the relief they request, we believe groups of affected listeners are entitled to a clarification of our recent actions [12] in the circumstances here.

A. *The Statute*

13. The starting point for Commission action in this area is the recognition that Section 1464 and the provisions of the Communications Act incorporating its substance impose both the authority and the duty to act. The fact that Section 1464 was moved into the criminal code in 1948 does not change in any way our responsibility; this is evident from the fact that Congress explicitly incorporated 1464 in the Act by reference and required the Commission to take certain administrative actions for violations. 47 U.S.C. §§ 312 (a) and (b), 503 (b) (1) (E). Our responsibilities with regard to Section 1464 are analogous to our enforcement responsibilities with regard to lottery broadcasts, 18 U.S.C. § 1304, and fraud by radio, 18 U.S.C. § 1343. In *FCC* v. *ABC*, supra, the Supreme Court characterized our function under the lottery statute this way:

> [W]e have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, in the exercise of its licensing authority, to aid in implementing the statute, whether by general rule or by individual decisions. 347 U.S. at 289.

Contrary to Petitioner's contention, the Commission has not undertaken to usurp criminal enforcement responsibilities that belong exclusively to the Justice Department.

14. As for the constitutionality of the statute, the Commission is not the appropriate body to make that determination. The Commission was created by Congress, which also enacted this statute. In fact, Congress at least four times has given passage to the substance of Section 1464,[13] and it cannot be presumed that Congress ignored constitutional considerations. We believe the statute to be constitutional, but, in any event, we are without authority to set aside enactments of Congress. Nor can we achieve the same end by ignoring or declining to enforce them. Petitioners' arguments addressed to the constitutionality of the statute are for the courts to consider.

B. *Application of Section 1464.*

15. Our application of the statute in the *Sonderling* case was precisely in line with the then relevant Supreme Court decisions on obscenity, as we read them (see Notice, pp. 3–11), and consistent with the limited Commission precedent (see *WUHY–FM*, *supra*). We do not find it necessary to add to our discussion of the applicable standards, for, on review, we are satisfied that the Notice expressed our reasoning fully. Since we issued the Notice, however, the Supreme Court has decided a series of cases which we believe reinforce our analysis.

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[12] Clarification is offered here not because of any inadequacy in our prior pronouncements, but because there is apparent misunderstanding of the Commission's intentions largely as a result of second and third-hand accounts of its actions. In support of their allegations, for example, Petitioners rely on newspaper and magazine accounts of the Commission's actions and licensees' reactions.

[13] It was adopted as part of the Radio Act of 1927 and again as part of the Communications Act of 1934, and it was reenacted in the 1948 revision of the Criminal Code. In 1960, Congress effectively reenacted the substance of 1464 when it incorporated the statute by reference in Section 503 of the Communications Act, the forfeiture statute.

We are convinced that our limited action against Sonderling, based upon the broadcast of material prohibited by Section 1464, is well within the constitutional boundaries established by the Supreme Court,[14] particularly in view of the nature of the medium.[15]

16. One further matter merits comment. The Petitioners state that our Notice to Sonderling "did not pin its obscenity and indecency findings on the presence of children." That is true only in the most literal sense. The Notice stated that the forfeiture was based "on the pervasive and intrusive nature of broadcast radio, even if children were left completely out of the picture." Thus, we concluded that the material broadcast by Sonderling was impermissible even without taking children into consideration.

17. We went on to point out, however, that children were "in the audience during these afternoon hours," and we cited evidence which indicated that the program was "not intended solely for adults." From this, we concluded that "the presence of children in the broadcast audience makes this an *a fortiori* matter." The obvious intent of this reference to children was to convey the conclusion that this material was unlawful, and that it was even more clearly unlawful when presented to an audience which included children. This factor aggravates the violation, and neither the licensee nor the petitioners, for that matter, have brought any new facts to our attention which might persuade us that "remission or mitigation by the Commission" is in order, 47 U.S.C. 504(c), or that we should withdraw the Notice on our own motion.

C. *The Inquiry.*

18. The criticisms of our Inquiry into allegedly obscene program material are somewhat surprising. Given our statutory obligation and the numerous complaints we have received, it is difficult to see how we could have avoided some kind of investigation. The Inquiry under Section 403 was instituted as a vehicle for this investigation because it permits the investigators to subpoena testimony and documents on approval by the Chief Administrative Law Judge. The Inquiry was ordered to be non public—just as grand jury investigations are non public—so that innocent parties would not be injured by investigation of possible violations of law. This concern is also part of the basis for an exemption from the Freedom of Information Act, which permits agencies to withhold investigative files. 5 U.S.C. § 553(b)(7). See *Media Access Project* (FCC 73–573). Broadcasters might also be intimidated by premature developments in an open hearing. For ex-

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[14] *Miller* v. *California*, 13 Cr. L. Rep. 3161 (1973); *Paris Adult Theater* v. *Slaton*, 13 Cr. L. Rep. 3171 (1973); *U.S.* v. *Orito*, 13 Cr. L. Rep. 3192 (1973); *Kaplan* v. *California*, 13 Cr. L. Rep. 3194 (1973); *U.S.* v. *12 200-foot Reels of Film*, 13 Cr. L. Rep. 3197 (1973). Under the new standards, for example, one test is whether the work, taken as a whole, lacks "serious literary, artistic, political, or scientific value." *Miller, supra*, 13 Cr. L. Rep. at 3164. This appears to be considerably narrower than the former test, which looked to whether the work was "utterly without redeeming social value," *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966); and it would appear to permit agencies such as this one broader authority in their enforcement of obscenity statutes. If the Sonderling material was "utterly without redeeming social value," as we found that it was, then it *a fortiori* lacked "serious literary, artistic, political, or scientific value."

[15] The Supreme Court has recognized that "the mode of dissemination" of material may be relevant to determinations of obscenity, particularly when there is "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." See *Miller* v. *California*, 13 Cr. L. Rep. at 3162; *Burstyn* v. *Wilson*, 343 U.S. 495, 502 (1952). See also *Programming Policy Statement*, 25 Fed. Reg. 7291, 7292–93, 20 Pike & Fischer, R.R. 1901, 1906–07 (1960).

ample, testimony or other evidence which might not warrant administrative or criminal action might nevertheless inhibit broadcasts of controversial material. An open Inquiry, thus, might have precisely the chilling effect the Petitioners are concerned about.[16]

IV. ALLEGED CHILLING EFFECT

19. The major thrust of petitioners' complaint appears to be the claim that the Commission's actions in this area are chilling the First Amendment rights of broadcasters and listeners. They allege that "There can be little doubt that the Commission's intent in initiating the instant proceedings was to censor sexual material off the air. . . . And the proof of the pudding is in the tasting—the intended *effect* was promptly achieved. Sexually oriented talk vanished from the airwaves of WGLD and numerous other broadcasters." (Petition, at 20.)

20. This claim flies in the face of the facts. Far from attempting to censor all sexual material off the air, the Commission went out of its way in the Sonderling Notice to disclaim any such intention. For example, the Commission said:

> First, it is most important to make clear what we are not holding. We are emphatically *not* saying that sex *per se* is a forbidden subject on the broadcast medium. We are well aware that sex is a vital human relationship which has concerned humanity over the centuries and that sex and obscenity are not the same thing. Notice, at 4.

At another point, the Commission explained that it was discussing the matter at length in its Notice "lest we inadvertently chill expression on matters of public concern and interest." [17]

21. There may be some merit, however, to the Petitioners' allegations that some broadcasters have reacted to our actions by taking all sex-related material off the air. Petitioners point out that in its letter to the Commission in response to the Notice of Apparent Liability, Sonderling made the following statement:

> In any event, we believe that the Commission's action is inconsistent with the constitutional protections of the First Amendment to the Constitution and of Section 326 of the Communications Act of 1934 which prohibits the Commission from exercising any censorship over radio communications or from interfering with the right of free speech by means of radio communication. Actions such as this have the "chilling effect" of inhibiting the free discussion of important public issues. *In this case, the Commission's action has led to the cancellation of WGLD's program and comparable programs on other broadcast stations.* (Emphasis added.)

22. The fact that Sonderling has abandoned its sex-talk show and alleges that other stations may have done the same thing is not disturbing in itself. Licensees make programming decisions every day—dropping shows, instituting others, modifying still others—and the Commission will not second-guess them as long as these decisions are

[16] See also letter to Honorable John E. Moss, FCC 73-360, adopted March 29, 1973.

[17] This same sensitivity to First Amendment rights is present in the Inquiry. A major reason for not holding a public proceeding was our genuine concern that a highly-publicized, open Inquiry would be more likely than a non public one to inhibit broadcasters from presenting controversial material. Moreover, it is clear throughout the entire history of Commission actions with regard to Section 1464 that the prohibitions have been construed very narrowly, that licensee judgment is given great leeway, and that sanctions are applied only in cases of clear-cut violations where failure to act would be to ignore the statutory mandate of Congress. An *intention* to "chill" is patently inconsistent with such a pattern of action.

"reasonably responsive to the needs and interests of the public." *Programming Policy Statement*, 25 Fed. Reg. 7291, 7294, 20 Pike & Fisher, R.R. 1901, 1909 (1960). Our policy has long been that the day-to-day operation of broadcast stations is primarily the responsibility of the licensees, and that "the licensee must find his own path [of programming] with the guidance of those whom his signal is to serve." *Id.* at 7296.

23. At the same time, we must be sensitive to allegations that our actions have forced licensees to abandon controversial programs which are not unlawful. This is particularly so when the allegations come in part from licensees who are in fact abandoning controversial programs. Our Notice to Sonderling was prompted not by the fact that WGLD–FM had a sex-talk show; many other stations also had such programs and have not been assessed. We acted against Sonderling solely because the station had broadcast obscene and indecent language during its program, and our Notice made this fact quite clear. This Commission has consistently adhered to the Policy that it will not—indeed cannot—insist that licensees abandon program material because it is offensive to some or even a substantial number of listeners. *Programming Policy Statement, supra; Pacifica Foundation, supra; Anti-Defamation League* v. *FCC*, 131 U.S. App. D.C. 146, 403 F. 2d 169 (1968), *cert. denied*, 394 U.S. 930 (1969). However, the Supreme Court has indicated that the Commission can insist that its licensees be "law abiding." *FCC* v. *ABC*, 347 U.S. 284, n. 7 (1954). One of the laws specifically applicable to broadcast material is 18 U.S.C. 1464.

24. If the licensee goes beyond the requirements of the law and drops sexual material altogether, as Sonderling says he did here, that is an act of licensee judgment. We assume that the licensee takes into consideration the tastes, needs and interests of his community in making this judgment. We take no position as to whether Sonderling's dropping of the program was good or bad, or whether it was or was not in the public interest. That decision was Sonderling's and we insist that it was not mandated by anything we said in our *Notice of Apparent Liability*.

25. In order to make it absolutely clear, we reiterate here our approach to enforcement of section 1464 with regard to sex-talk shows, in language from the Sonderling *Notice:*

> We are emphatically not saying that sex *per se* is a forbidden subject on the broadcast medium. We are well aware that sex is a vital human relationship which has concerned humanity over the centuries, and that sex and obscenity are not the same thing. In this area as in others, we recognize the licensee's right to present provocative or unpopular programming which may offend some listeners, *Pacifica Foundation*, 36 FCC 147, 149 (1964). Second, we note that we are not dealing with works of dramatic or literary art as we were in *Pacifica*. We are rather confronted with the talk or interview show where clearly the interviewer can readily moderate his handling to the subject matter so as to conform to the basic statutory standards—standards which, as we point out, allow much leeway for provocative material * * * The standards here are strictly defined by the law: The broadcaster must eschew the "obscene or indecent."

26. In conclusion, we stand by our recent actions in the area of broadcast obscenity and indecency. Commissioner Hooks said in a statement

concurring in the Sonderling Notice: "As public servants, the Commission, while cognizant and rueful of any stigma of censorship, has a legal and moral obligation to be responsive to the cause of public outcry and a duty to act to the extent permitted by law." We believe that broadcast licensees should be sensitive to the needs and interests of their communities, and we insist that they operate in accordance with the law.

27. Accordingly, IT IS ORDERED, that the relief requested in the Application for Remission of Forfeiture and Petition for Reconsideration, filed by ICCB and the Illinois ACLU, IS DENIED, except to the extent that the Petition is treated as a request for clarification and answered herein. IT IS FURTHER ORDERED that the ACLU's request that the Commission's Obscenity Inquiry be made public IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

41 F.C.C. 2d

F.C.C. 73-650

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re issuance of TAX CERTIFICATE TO SOUTHERN BROADCASTING COMPANY } BTC-7128

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1954 INTERNAL REVENUE CODE (26 U.S.C. 1071)

1. On June 13, 1973, the Federal Communications Commission granted its consent to the transfer of control of the license of Station WBMG-TV, Birmingham, Alabama, from Southern Broadcasting Company (32.67%) et al. to Roy H. Park Broadcasting of Birmingham, Inc. (BTC-7128).

2. It is hereby certified that the above transfer of control, as it affects Southern Broadcasting Company, was necessary or appropriate to effectuate the new policy adopted by the Commission with respect to ownership and control of broadcast facilities (First Report and Order in Docket No. 18110, FCC 70-310, 22 FCC 2d 306 (1970), Memorandum Opinion and Order on Reconsideration, FCC 71-211, 28 FCC 2d 662 (1971)).

3. This certificate is issued pursuant to the provisions of Section 1071 of the 1954 Internal Revenue Code.

In witness whereof I have hereunto set my hand and seal this 13th day of June, 1973.

Chairman Burch not participating; Commissioner Johnson dissenting; Commissioner H. Rex Lee absent.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-649

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications by SOUTHERN BROADCASTING CO. ASSIGNOR AND ROY H. PARK BROADCASTING OF BIRMINGHAM, INC., ASSIGNEE For Transfer of Control of Station WBMG-TV, Birmingham, Ala., and Assignment of License of Station WBMG-TV From Birmingham Television Corp. to Roy H. Park Broadcasting of Birmingham, Inc.	BTC-7128 and BALCT-518

JUNE 13, 1973.

BIRMINGHAM TELEVISION CORP.,
2075 Golden Crest Drive,
Birmingham, Ala. 35209
ROY H. PARK BROADCASTING OF BIRMINGHAM, INC.,
c/o JOHN B. BABCOCK,
Terrace Hill, Ithaca, N.Y. 14850

DEAR SIRS: This concerns the application for transfer of control of Birmingham Television Corporation, licensee of Station WBMG-TV, Birmingham, Alabama from Southern Broadcasting Company (32.67%), William P. Dubois (26.4%), et al. to Roy H. Park Broadcasting of Birmingham, Inc. (BTC-7128) and the pro forma application for the assignment of the license and assets of Station WBMG-TV from Birmingham Television Corporation to Roy H. Park Broadcasting of Birmingham, Inc. (BALCT-518).

Roy H. Park, through his ownership of Park Broadcasting, Inc. (Delaware), owns all the stock of Roy H. Park Broadcasting of Birmingham, Inc. Park Broadcasting, Inc. also owns all the stock of Roy H. Park Broadcasting of Virginia, Inc., the licensee of Stations WTVR-AM-FM-TV, Richmond, Virginia. On September 1, 1972 the Black Broadcasting Coalition, of Richmond, filed a Petition to Deny the renewal of these stations. This group also filed a "Petition to Prevent Continued Violation of Commission's Equal Employment Opportunities Rules", in which it raises a complaint against the operation of Stations WTVR-AM-FM-TV. These petitions, which make several serious allegations, are currently under Commission review. In light of these unresolved questions, the above mentioned applications have this day been granted subject to whatever action the Commission may deem appropriate following resolution of these matters.

Chairman Burch not participating; Commissioner Johnson dissenting and issuing a statement; Commissioner H. Rex Lee absent;

Commissioner Hooks concurring in part and dissenting in part and issuing a statement.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

Dissenting Opinion of Commissioner Nicholas Johnson

Today the Commission approved the voluntary transfer of WBMG–TV, Birmingham, Alabama, from the Birmingham Television Corporation to Roy H. Park Broadcasting of Birmingham, Inc.

The transferors sought this action in order to bring themselves into full compliance with the Commission's one-to-a-market rule, Section 73.636 of the Commission's rules.

The recipient of WBMG–TV's license, Roy H. Park, already has other substantial broadcast interests:

WMCT–AM–FM–TV, Greenville, North Carolina
WSLS–TV, Roanoke, Virginia
WVTR–TV, Utica, New York
WTVR–AM–FM–TV, Richmond, Virginia
WJHL–TV, Johnson City, Tennessee
WDEF–AM–FM–TV, Chattanooga, Tennessee
WNAY, Yankton, South Dakota
KRSI–AM–FM, St. Louis Park, Minnesota
WEBC, Duluth, Minnesota
KWJJ, Portland, Oregon

The assignment, therefore, of WBMG–TV to Roy H. Park Broadcasting brings Mr. Park's broadcast properties to a total of eighteen—twelve of which are in Virginia, North Carolina, Tennessee, and Alabama, along with a newspaper in Georgia.

The Commission presently has in its files a complaint relating to WDEF and WDEF–TV, Chattanooga, Tennessee. The allegation is that these stations are engaged in unfair promotion of the business interests of the complainant's competitor. The Complaints and Compliance Division of the FCC is currently investigating this allegation.

In addition, the license renewals for stations WNCT, Greenville, North Carolina and WTVR–AM–FM–TV, Richmond, Virginia, have been deferred because of inquiries concerning their Equal Employment Opportunity Programs. The Black Broadcasting Coalition of Richmond has petitioned to deny the WTVR–AM–FM–TV renewals citing the stations in a "Petition to Prevent Continued Violation of Commission's Equal Employment Opportunity Rules." In this petition the coalition has alleged that none of the station's 81 employees are black. In the Petition to Deny, the Coalition has alleged: (1) failure to ascertain the community needs; (2) failure to propose responsive programming; and, (3) a poor minority employment record.

According to the 1970 Census, Birmingham, Alabama had a total population of 300,910 of whom 126,388 were blacks. Roy H. Park Broadcasting proposes to operate WBMG–TV with a staff of 36 and a "satisfactory Equal Employment Opportunity Program."

The assignment of this license to Roy H. Park Broadcasting gives Mr. Park his second UHF operation and his seventh television station.

He owns, as well, seven AM and four FM stations. Mr. Park, with his wife, also owns the Warner Robbins, Georgia *Daily Sun* newspaper.

Faced with this rather devastating record, the Broadcasting Bureau blithely finds neither undue concentration of mass media nor merit to the business and employment practices complaints. The majority, with straight face, puts its "public interest" imprimateur upon this transaction without thought of further inquiry or hearing.

I dissent.

SEPARATE STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS CONCURRING IN PART; DISSENTING IN PART

While recognizing that the Commission's approval of this assignment of WBMG–TV, Birmingham, Alabama from Birmingham Television Corporation to Roy H. Park Broadcasting—at a time when Park's Richmond, Virginia stations (WTVR–AM–FM–TV) are attacked in an outstanding Petition to Deny based on alleged Equal Opportunity Employment violations—is subject to the resolution of that proceeding, I dissent on a narrow but important ground.

I understand that it is the Commission's normal practice to defer action on or set for hearing applications affecting licenses (e.g., new stations renewals, assignments and transfers) when a current or prospective licensee is accused or suspected of activities sufficiently serious to be deemed as reflective of the "character" of the subject.[1] In order to be considered grave enough to bear directly on character, the barometer used (although not consistently) is the measure of terpitude involved in the offense. Hence, while technical violations of our engineering or logging rules are not generally deemed "character"-related, violations such as fraud, lotteries, and anti-trust are customarily viewed as serious enough to freeze Commission action on the matter instantly before it.[2]

It is my view that violations of anti-discrimination laws are, at least, as egregious as violations of anti-trust laws and the tragic results of this country's sordid history of discrimination are apparent in the smoldering hate and burned out hovels in the nation's ghettos.

Therefore, my dissent is pointed at the Commission's past policy which fails to elevate possible EEO rule transgressions to the plane of other offenses considered to represent character deficiencies. Again, I stress that I am not objecting to the thrust of this action which, in fact, does condition the assignment grant on the ultimate disposition of the discrimination charges against the assignee with respect to the operation of its Richmond stations.

[1] See, *United Television Co., Inc., et al.*, 40 F.C.C. 2d 472 (1973).
[2] Compare, *ABC–ITT Merger*, 4 F.C.C. 2d 709 (1966).

F.C.C. 73-686

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of STEREO 94, INC. (WAMX), ASHLAND, KY. For Construction Permit	File No. BPH-7281

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 3, 1973)

BY THE COMMISSION: COMMISSIONER WILEY NOT PARTICIPATING.

1. The Commission has before it for consideration a petition for reconsideration filed August 9, 1971, by Stereo 94, Inc., a licensee of FM station WAMX, Ashland, Kentucky, directed against our action of June 30, 1971, denying its "Petition for Ruling, Waiver or other Relief" with respect to payment of the required $1,800 grant fee in connection with the above-captioned "major" change application granted November 27, 1970. 30 FCC 2d 709 (1971).

2. Prior to November 2, 1970, station WAMX (formerly WCMI-FM) was operated in conjunction with commonly owned station WCMI(AM). At that time, the AM license was assigned to Greater Ashland Broadcasting Corporation and the FM license was assigned to Stereo 94, Inc. Because of the ownership separation, Stereo 94 decided to move its FM studio, and to terminate an arrangement whereby its FM antenna was side-mounted on the WCMI tower. Therefore, the above-captioned application was filed to move the FM transmitter to a site on considerably higher ground approximately five miles south of Ashland. Notwithstanding decreases in antenna height and transmitter power output (TPO), the height above average terrain (HAAT) was sufficiently increased to expand the 1 mV/m service contour by approximately 92 percent. Because of the magnitude of the change in areas served, the application was classified as one for "major" change pursuant to section 1.573(a)(1) of the rules, with an attendant filing fee of $200 and grant fee of $1,800. The $200 filing fee has been paid.

3. In its petition for reconsideration, Stereo 94 maintains that the present application was "reasonably necessary to comply with changing Commission policy."[1] Specifically, Stereo 94 alleges that the assignment and subsequently filed modification applications were necessary to effect a separation of AM and FM ownership and operation "clearly required under our one-to-a-market policy." This assertion is incorrect. The one-to-a-market rule, even as originally proposed, has never contemplated divestiture by any licensee of an

[1] Section 1.1104(a) of the Commission's rules provides that no fee is required for an application filed for the sole purpose of complying with new or additional requirements of Commission rules.

existing facility.[2] With respect to the application to move the FM transmitter, it must be noted that our rules do not prohibit the side-mounting of an FM antenna on an AM antenna of a different licensee. Therefore, Stereo 94's argument in this regard must be rejected.

4. Secondly, Stereo 94 refers to "unique grandfather and equitable considerations relating to the timing and manner in which the new fee schedules were placed in effect." The Report and Order adopting the new fees schedule was released July 2, 1970, with an effective date of August 1, 1970.[3] With regard to grant fees, the Report and Order provided that all applications pending as of July 1, 1970, would not be subject to a grant fee, even if the grant were made after the effective date of August 1, 1970.

5. The main thrust of Stereo 94's argument is the lack of advance notice which might have made possible the filing of the above-captioned application on or before July 1, 1970, thereby avoiding liability for payment of a grant fee. Even if such advance notice had been given, Stereo 94, as a mere proposed assignee, was ineligible at that point in time to apply for and prosecute, in its own name, any application for technical improvements at the station. While appreciating the applicant's desire to avoid the payment of fees, we see no justification for treating the above-captioned application as a July 1, 1970, filing, when in fact it was not filed until October 9, 1970. Nor does the fact that the assignment application was filed March 31, 1970, prior to the cut-off and effective dates of the new fee schedule, justify consideration of the subsequent site change application as having been filed *nunc pro tunc* with the assignment application. As already noted, the filing of the above-captioned site change application was not a necessary by-product of the assignment of license, and must therefore be viewed as a separate transaction providing a significant benefit to Stereo 94 by almost doubling the station's primary service area.

6. The present fee schedule was adopted after extensive rule-making proceedings and the respective amounts decided upon were believed to be equitable to all applicants and licensees, based on considerations of direct and indirect cost to the government, the value of the authorization to the recipient, and the public policy or interest served. Its introduction was timed to coincide, insofar as possible, with fiscal year 1971. We have carefully considered the grounds upon which Stereo 94 has based its waiver request, and find that it has not demonstrated that the $1,800 grant fee is either prohibitive or unduly burdensome to the operation of station WAMX, or that other factors exist which would warrant the relief requested.

7. Accordingly, the above-referenced petition for reconsideration IS DENIED.

8. IT IS FURTHER ORDERED, That Stereo 94, Inc. (WAMX), shall submit the required grant fee of $1,800 within thirty (30) days of the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] See *Multiple Ownership of Standard, FM & TV Broadcast Stations*, 12 FCC 2d 912 (1968).
[3] *Fee Schedule*, 23 FCC 2d 880 (1970).

F.C.C. 73-686

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of STEREO 94, INC. (WAMX), ASHLAND, KY. For Construction Permit	File No. BPH-7281

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 3, 1973)

BY THE COMMISSION: COMMISSIONER WILEY NOT PARTICIPATING.

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3. In its petition for reconsideration, Stereo 94 maintains that the present application was "reasonably necessary to comply with changing Commission policy."[1] Specifically, Stereo 94 alleges that the assignment and subsequently filed modification applications were necessary to effect a separation of AM and FM ownership and operation "clearly required under our one-to-a-market policy." This assertion is incorrect. The one-to-a-market rule, even as originally proposed, has never contemplated divestiture by any licensee of an

[1] Section 1.1104(a) of the Commission's rules provides that no fee is required for an application filed for the sole purpose of complying with new or additional requirements of Commission rules.

existing facility.[2] With respect to the application to move the FM transmitter, it must be noted that our rules do not prohibit the side-mounting of an FM antenna on an AM antenna of a different licensee. Therefore, Stereo 94's argument in this regard must be rejected.

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5. The main thrust of Stereo 94's argument is the lack of advance notice which might have made possible the filing of the above-captioned application on or before July 1, 1970, thereby avoiding liability for payment of a grant fee. Even if such advance notice had been given, Stereo 94, as a mere proposed assignee, was ineligible at that point in time to apply for and prosecute, in its own name, any application for technical improvements at the station. While appreciating the applicant's desire to avoid the payment of fees, we see no justification for treating the above-captioned application as a July 1, 1970, filing, when in fact it was not filed until October 9, 1970. Nor does the fact that the assignment application was filed March 31, 1970, prior to the cut-off and effective dates of the new fee schedule, justify consideration of the subsequent site change application as having been filed *nunc pro tunc* with the assignment application. As already noted, the filing of the above-captioned site change application was not a necessary by-product of the assignment of license, and must therefore be viewed as a separate transaction providing a significant benefit to Stereo 94 by almost doubling the station's primary service area.

6. The present fee schedule was adopted after extensive rule-making proceedings and the respective amounts decided upon were believed to be equitable to all applicants and licensees, based on considerations of direct and indirect cost to the government, the value of the authorization to the recipient, and the public policy or interest served. Its introduction was timed to coincide, insofar as possible, with fiscal year 1971. We have carefully considered the grounds upon which Stereo 94 has based its waiver request, and find that it has not demonstrated that the $1,800 grant fee is either prohibitive or unduly burdensome to the operation of station WAMX, or that other factors exist which would warrant the relief requested.

7. Accordingly, the above-referenced petition for reconsideration IS DENIED.

8. IT IS FURTHER ORDERED, That Stereo 94, Inc. (WAMX), shall submit the required grant fee of $1,800 within thirty (30) days of the release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[2] See *Multiple Ownership of Standard, FM & TV Broadcast Stations*, 12 FCC 2d 912 (1968).
[3] *Fee Schedule*, 23 FCC 2d 880 (1970).

F.C.C. 73–710

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of STORER BROADCASTING CO. For Renewal of License for Station WJBK–TV, Detroit, Mich.	File No. BRCT–43

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 6, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING. COMMISSIONER HOOKS ABSTAINING FROM VOTING.

1. The Commission has before it for consideration: (i) a Petition for Reconsideration, filed February 22, 1971, as amended February 25, 1971, by the Inter-Faith Centers for Racial Justice, Inc. (hereinafter referred to as the IFC), directed against certain actions taken by the Chief, Broadcast Bureau; (ii) an Opposition to the Petition for Reconsideration, filed April 20, 1971, by Storer Broadcasting Company (hereinafter referred to as Storer), licensee of Television Station WJBK, Detroit, Michigan; (iii) a Reply to the Opposition to the Petition for Reconsideration, filed May 20, 1971, by the IFC; [1] and, (iv) various other related pleadings.[2]

SUPPLEMENTAL PLEADINGS

2. Before proceeding to the merits of IFC's petition for reconsideration, we will consider the numerous supplemental pleadings filed in connection with the petition. See note 2, *supra*. The first of these is IFC's Motion to Strike and Remove, filed May 20, 1971, directed against Storer's Opposition pleading. In short, IFC maintains that Storer's opposition should not be considered because it (i) was untimely filed, (ii) is improperly verified, and (iii) exceeds the page

[1] The IFC filed concurrently with its Reply a Motion for Waiver of Rule Limiting Length of Reply. In its Motion the IFC request waiver of Section 1.106(h) of the Commission's rules, 47 C.F.R. 1.106(h), which limits the length of reply pleadings to ten double-spaced typewritten pages. Without elaborating on the reasons advanced in support of its request, the IFC's Motion is granted and its Reply is accepted for filing and will be considered in its entirety.

[2] Also before the Commission for consideration are: (a) a Motion to Strike and Remove, filed May 20, 1971, by the IFC; (b) an Opposition to the Motion to Strike and Remove, filed May 24, 1971, by Storer; (c) a Reply to the Opposition to the Motion to Strike and Remove, filed June 1, 1971, by the IFC; (d) a Motion to Strike or, In the Alternative, to Accept Supplemental Pleading and a Supplemental Pleading entitled Response to Reply, filed on June 22, 1971, by Storer; (e) a Motion for Leave to File and a Response to Motion to Strike or, In the Alternative, to File Supplemental Pleading, filed July 26, 1971, by the IFC; (f) a Motion for Leave to File Statement and a Statement Concerning Representation by Counsel and Participation of Commissioner, filed October 26, 1971, by Storer; (g) an Opposition to the Motion for Leave to File, a Motion to Strike and Remove, and a Response to Statement Concerning Representation by Counsel and Participation by Commissioner, concurrently filed on November 23, 1971, by the IFC; and, (h) a Reply to Response to Statement Concerning Representation by Counsel and Participation by Commissioner, filed December 2, 1971, by Storer.

limitations prescribed in Section 1.106(h) of the rules. 47 C.F.R. 1.106 (h).

3. The facts disclose that Storer, by letter dated March 3, 1971, requested an extension of time until April 10, 1971, to file its opposition to the petition for reconsideration. This request was granted by letter dated March 12, 1971. Then, by letter dated April 6, 1971, Storer requested a further extension of time, until April 19, 1971, to file its opposition pleading. This request was granted by telephone on April 6, 1971, by the Commission's staff. On April 19, 1971, Storer's counsel notified the Commission's staff that its opposition was still at the printers and, thus, requested an additional one-day extension of time to file that pleading. This request was also granted by the Commission's staff.

4. The IFC's Motion to Strike and Remove will be *denied*. Section 1.45 of the rules, 47 C.F.R. 1.45, provides in pertinent part that, "[a]s a matter of discretion, the Commission may rule *ex parte* upon requests for * * * extensions of time * * *." As noted above, Storer was granted several extensions of time, ultimately to April 20, 1971, to file its opposition. The opposition was, therefore, timely filed. The opposition is also properly verified, in that it is signed by Storer's counsel and executive vice-president. Section 1.52 of the rules, 47 C.F.R. 1.52, does not prohibit Storer's counsel from acting in such a dual capacity. As to the length of the pleading, fairness dictates that we consider Storer's opposition to these matters raised by the IFC in its petition and we will not strike the pleading on the grounds that it exceeds the prescribed page limitations. See note 1, *supra*.

5. The second group of supplemental pleadings relates to Storer's June 22, 1971, Motion to Strike or, In the Alternative, to Accept Supplemental Pleading. The filing of this pleading was precipitated by alleged "new matter" raised by the IFC in its reply to Storer's opposition. Stripped of detail, Storer maintains that paragraphs 18–19, 26, 38, and 50(c), and Exhibits 4 and 5 of IFC's reply contain "new matter" in contravention of Section 1.106(h) of the Commission's rule, 47 C.F.R. 1.106(h), which should be stricken from the record. Alternatively, Storer submits that should the Commission elect to consider the new matter allegedly contained in IFC's reply, then the Commission should also accept for filing and consideration licensee's Response to Reply, concurrently filed on June 22, 1971. The IFC, in opposition, maintains that the matters made the subject of Storer's motion are not "new matters" but, rather, merely respond to points placed in issue in Storer's opposition. The IFC also maintains that Storer's motion is procedurally defective because the Commission's rules do not provide for such a pleading. The IFC submits, therefore, that Storer's motion should be denied in both alternatives.

6. Section 1.106(h) of the rules clearly states that replies shall be limited to matters raised in oppositions. Based upon our review of IFC's reply we believe that the pleading does raise what may be properly characterized as "new matter." By way of example, the IFC in its petition for reconsideration acknowledged that Storer consulted with a number of black community leaders. The IFC did not, however, question the fact of such interviews until it filed its reply. Thus, we believe that the IFC has raised what may be properly characterized

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as "new matter," since it did not challenge the fact of such interviews until it filed its reply; i.e., the IFC's questions relating to Storer's interviews with specified black community leaders could have been raised in its petition for reconsideration. To the extent that IFC's reply pleading contains wholly new and previously unmentioned facts in support of its initial allegations, we believe we would be justified in striking such material and dismissing Storer's supplemental response to reply. As the court stated in *Valley Telecasting Co., Inc.* v. *FCC*, 119 U.S. App. D.C. 169, 338 F. 2d 278, with respect to late filed pleadings, it "cripples any decision making process and handicaps any agency in carrying out its functions." Here, both parties have filed several supplemental pleadings which, coupled with an influx of other petition to deny cases and staffing limitations, have contributed to a delay in resolving the issues raised in this proceeding. Notwithstanding, we recognize that, under the circumstances presented in this proceeding (e.g., our consideration of the instant pleadings come almost three years after the expiration date of the last license term for WJBK–TV), we conclude that fairness dictates that we consider all the pleadings filed by the parties. We will, therefore, *deny* Storer's Motion to Strike and accept its response to IFC's reply. However, we note that the sheer volume of the pleadings and the attitude of the parties has inordinately delayed our administrative process. We wish to emphasize, therefore, that we do not condone the violation of our procedural rules and that in the absence of extenuating circumstances we will not consider such pleadings in the future.

7. The final group of supplemental pleadings relates to Storer's Motion for Leave to File Statement and Statement Concerning Representation by Counsel and Participation of Commissioner, filed October 26, 1971. Storer submits that the IFC is represented by unidentified legal counsel, (namely, William T. Downs, Detroit, Michigan, and Albert Kramer, Executive Director, Citizens Communications Center, Washington, D.C.), which raises a matter of some significance in view of the provisions of Section 1.52 of the rules. Storer also submits that if, in fact, the IFC is represented by Mr. Kramer then an additional policy question is raised concerning the propriety of participation by Commissioner Johnson.

8. While we agree with Storer's interpretation of the intent of Section 1.52, we note that the IFC denies that either of these individuals have been retained in a legal capacity. We have no reason to doubt IFC's assertions. The mere fact that one or both of them have given certain advice or provided administrative assistance does not support a finding that they have been retained as counsel and Storer's contentions to the contrary appear to be speculative. Further, the only apparent motive suggested for concealing IFC legal representation appears to be the contention that to reveal Mr. Kramer's status might have some bearing on Commissioner Johnson's participation. This contention is without merit.

9. In substance, Storer maintains that since the royalties from Commissioner Johnson's book, *How to Talk Back to Your Television Set*, help fund the Citizens Communications Center, a serious question is presented as to whether the Commissioner should recuse himself or otherwise be disqualified by this agency. Citing, *In Re Murchison*,

349 U.S. 133, 136, 99 L. Ed. 942, 946 (1955); *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 425 F. 2d 583, 138 U.S. App. D.C. 152 (1970); *Texaco, Inc.* v. *FTC*, 336 F. 2d 754, 118 U.S. App. D.C. 366 (1964); *Gilligan, Will & Co.* v. *SEC*, 267 F. 2d 461 (1959). We recognize, of course, that upon a motion to disqualify an administrative official, it is he who must make the initial decision whether or not to recuse himself. *Weiss* v. *Hanna*, 312 F. 2d 711 (1963), *cert. denied*, 374 U.S. 853, *rehearing denied*, 375 U.S. 874. Nonetheless, we do not believe that Storer has provided a sufficient basis for disqualification. First, as noted above, we are of the opinion that Mr. Kramer has not been retained by the IFC as counsel in this proceeding. Second, an examination of the publishing contract for *How to Talk Back to Your Television Set* reveals an arrangement between Commissioner Johnson and Little, Brown and Company for the contribution by the publisher of all royalties to an "entity or entities devoted to the improvement of television." Also, the disposition of the royalties is solely at the discretion of the publisher as the "Author will not designate the beneficiary." Hence, the publisher has absolute control to distribute the royalties from his book and it cannot reasonably be implied that Commissioner Johnson has indicated any preference or partiality towards the CCC or any other organization. Storer's Motion for Leave to File Statement, therefore, will be *denied*.

THE PETITION

10. We will now direct our attention to IFC's petition. In so doing, we will first set forth a brief resume of the history of this proceeding to facilitate a better understanding of the pleadings. Initially, we note that Storer timely filed application for renewal of WJBK–TV's broadcast license on June 30, 1970. See 47 C.F.R. 1.539. Thereafter, by letter dated August 28, 1970, the IFC requested a ninety day extension of the cut-off date for filing petitions to deny the license renewal applications for six Detroit area television stations. See 47 C.F.R. 1.580(i).[3] Alternatively, the IFC requested that its letter be considered to contain sufficient information to warrant withholding action on the license renewal applications for the stations made the subject of its letter pending the submission of more comprehensive reports from the IFC and other interested parties.

11. The IFC served a copy of its letter on each of the stations specified therein. Nonetheless, the Commission, by letter dated September 14, 1970, forwarded a copy of the IFC's letter to each licensee and permittee [4] requesting their comments. Storer, already in receipt of the IFC's letter, elected to file comments thereon before being formally requested to do so by the Commission. In its letter of response, Storer stated that no person connected with the IFC had ever requested to inspect WJBK–TV's public file, that the IFC's letter did not contain any specific allegations of fact with respect to WJBK–TV, and that the

[3] The stations made the subject of the IFC's letter were: WWJ–TV, WJBK–TV, WXYZ–TV, WTVS–TV, WXON–TV, and WKBD–TV. By letter dated October 12, 1970, the IFC withdrew its request insofar as it related to WTVS–TV and WXYZ–TV.

[4] At the time the IFC's letter was filed, renewal applications for WXON–TV and WKBD–TV were not available for public inspection since WXON–TV, Inc., and Kaiser Broadcast Company were permittees—not licensees—of the stations and, thus, were not required to file applications for renewal of license.

IFC's alternative request should be denied in both respects. Then, by letter dated September 21, 1970, the IFC acknowledged receiving a copy of the Commission's letter of inquiry, renewed its request for an extension of time to file further information in support of its objections to the license renewal applications specified in its letter of 28 August 1970, and noted that it was currently preparing such information and wished to reserve the right to place it before the Commission for consideration. On the same day, (i.e., September 21, 1970), Storer filed further comments relating to the IFC's letter of 28 August 1970. Then, by letter dated September 25, 1970, the IFC acknowledged receipt of copies of Storer's letters of September 14 and 21, 1970, expressed confusion as to whether these letters were filed in response to the Commission's letter of inquiry, and submitted two affidavits in reply to some of the matters contained in Storer's letters.[5]

12. Thereafter, the Chief, Broadcast Bureau, by letter dated January 19, 1971, advised the IFC that he had elected to treat its letter of 28 August 1970 as an informal complaint filed pursuant to Section 1.587 of the Commission's rules, 47 C.F.R. 1.587; that, based upon his review of the matters submitted, the IFC had failed to advance any reason which would warrant further Commission action; and, therefore, that he was dismissing the IFC complaint as it related to WJBK–TV, WXOM–TV, and WKBD–TV.[6] Then, by action taken January 20, 1971, the Chief, Broadcast Bureau granted Storer's license renewal application for WJBK–TV for the remainder of its regular license term—i.e., October 1, 1973. See *Public Notice, Broadcast Actions*, Report No. 9629 (January 27, 1971). On February 22, 1971, as amended February 25, 1971, the IFC filed the above noted petition seeking reconsideration of the actions taken by the Chief, Broadcast Bureau.[7]

13. In its petition, the IFC seeks, among other things, reversal of the Broadcast Bureau's action of January 19, 1971, as it relates to the disposition of the alternative requests set forth in its letter of 28 August 1970. Storer, in its opposition, submits that this section of the IFC's petition is procedurally defective, in that the 30-day deadline for filing for reconsideration of the Bureau's action expired on February 18, 1971, three days before the IFC mailed its petition from Detroit, and approximately five days before the petition was actually received by the Commission (Opposition, p. 4). In reply, the IFC submits that the 30-day period within which to file for reconsideration did not begin to run until the day it received the Bureau's letter—January 21, 1971; that the 30-day period therefore, expired on February 20, 1971, which was a Saturday; and, thus, its petition was timely filed since the deadline for filing for reconsideration was advanced to the next business day, which was Monday, February 22, 1971.

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[5] As noted above, Storer submitted that, contrary to the implication set forth in the IFC's letter of 28 August 1970, no person connected with the IFC had ever requested to inspect WJBK–TV's public file. The affidavit of Alan K. Kamens submitted with the IFC's September 25, 1970 letter acknowledges this error.

[6] The IFC, on October 5, 1970, filed a petition to deny The Evening News Association's license renewal application for WWJ–TV and, accordingly, action on this application was deferred pending a decision on the merits of the petition to deny. See *The Evening News Association*, FCC 72–482, 35 FCC 2d 366 (1972).

[7] As previously noted, the IFC's letter of 28 August 1970 concerned six Detroit area television stations (n. 3, *supra*). The instant petition for reconsideration is only directed at the Commission's actions as related to WJBK–TV (Petition, p. 6).

14. Section 1.106 of the Commission's rules, 47 C.F.R. 1.106, which implements Section 405 of the Communications Act, 47 U.S.C. 405, provides that a petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of release of the document containing the full text of the action taken. As noted, the Broadcast Bureau's letter was dated and mailed on January 19, 1971. Accordingly, the IFC's petition for reconsideration of this action should have been filed with the Commission on or before February 18, 1971. See 47 C.F.R. 1.4 (a), (c), and (g). Thus, the IFC's petition for reconsideration of this aspect of the Bureau's action is untimely and we cannot consider said pleading under the provisions of Section 405 of the Act and Section 1.106 of the Commission's implementing rules. We have, nonetheless, reviewed the entire sequence of events leading to the issuance of the Bureau's letter of 19 January 1971. In so doing, we are unable to conclude that the reasons advanced by the IFC in its letter of 28 August 1970 were sufficient to support either of its requests.

15. Initially, we note that the Broadcast Bureau followed the Commission's normal procedures in processing the IFC's letter of August 28, 1970, by requesting each of the licensees and permittees involved to submit comments before issuing its opinion on the relative merits of the IFC's alternative requests. Nonetheless, the IFC submits that it was never informed of the acceptance of its letter by the Commission (Petition, pp. 3–4); and consequently, not knowing the status, if any, which had been accorded its letter, the IFC had no way of knowing if supplemental information could, or should, be submitted (Petition, pp. 4–5). The IFC continues that its confusion was further complicated by the progression of events with respect to WJBK–TV, in that Storer submitted comments to the Commission relating to its August 28th letter prior to the time the IFC actually received notice that the Commission had made inquiry of the licensee (Petition, pp. 4–5). The IFC also submits that the Bureau committed reversible error by indicating that Storer filed comments under a letter dated October 2, 1970 (Petition, p. 6); and, further, in its failure to indicate that the IFC had filed additional comments under letters dated September 21 and 25, 1970 (Petition, p. 6).

16. Based upon our review of the circumstances leading to the issuance of the Bureau's letter of 19 January 1971, we are not convinced that the IFC was so confused that it was uncertain on how it should proceed against WJBK–TV. We find it noteworthy that during this same time period the IFC filed a petition to deny The Evening News Association's application for renewal of license for WWJ–TV, Detroit, Michigan. It appears, therefore, that the IFC could have followed the same procedure concerning Storer's application for renewal of license for WJBK–TV. Further, while the Bureau's letter mistakenly indicated that Storer had filed comments under a letter dated October 2, 1970 and failed to note that the IFC had filed comments under letters dated September 21 and 25, 1970, these errors do not provide a sufficient basis to cause us to exercise our discretion and set aside the Bureau's final determination as it related to the IFC alternative requests.

17. The Commission has established a system of advance notification to the public of the filing of applications for renewal of broad-

cast licenses. *In the Matter of Amendment of Section 1.580(i) of the Rules*, FCC 69–534, 34 F.R. 7964, 16 RR 2d 1512 (1969).[8] The advance notification system has several purposes. First, it is designed to assure that all interested parties will be advised of the fact of the filing of a renewal application so that they will have ample opportunity to submit to the Commission whatever comments they may have concerning the licensee's stewardship. Second, it is designed to assure that the orderly administration of the Commission's processes will not be thwarted by the filing of belated pleadings.

18. A review of Storer's license renewal application for WJBK–TV discloses that the licensee made the required notices on the station on June 17, 20, 21, and 23, 1970, and in the *Detroit Free Press* on June 11, 13, 15 and 18, 1970. In its letter of 28 August 1970, however, the IFC indicated that it had made diligent efforts to examine WJBK–TV's renewal application but that such efforts had been hampered by lack of cooperation and accessibility to necessary materials, even when these materials are supposedly kept on file locally for public inspection. If the IFC had, in fact, made efforts to inspect WJBK–TV's renewal application and had been unable to do so because the application was not available or Storer had otherwise denied access to its public file, an extension of the cut-off date would have been warranted. However, as noted in Storer's response of September 14, 1970, and as subsequently acknowledged in the IFC letter of September 25, 1970, no efforts were made to inspect WJBK–TV's public file until September 9, 1970, at which time the application was made available. The plain fact is, therefore, that the IFC in its letter of 28 August 1970 failed to make any showing of some reasonable basis for extending the cut-off date specified in Section 1.580(i) of the rules.[9]

19. We are also of the opinion that the IFC failed to advance sufficient reasons in its letter of 28 August 1970 to warrant withholding action on WJBK–TV's license renewal application. In its letter, the IFC charged all six Detroit area television stations with: (1) lack of a permanent apparatus for dialogue; (2) devoting an inadequate amount of time to public affairs programming; (3) unbalanced programming; (4) a deficient canvass of the public; (5) devoting too much time to commercials; and, (6) non-compliance with the Commission's equal employment opportunity rules. In the instant petition, the IFC submits that the Bureau erred in its conclusions through its failure to make specific findings on *each* of these charges (Petition, pp. 6–9). Our review of IFC's letter discloses that it is devoid of any

[8] Pursuant to Section 1.580 of the rules broadcast licensees must announce publically, over their stations and in local newspapers of general circulation, within six weeks of the date when the application is due to be filed, that they are filing their renewal application; that the applications will be maintained at a designated place for public inspection; that members of the public who desire to bring to the Commission's attention facts concerning the operation of their stations can do so by writing to the Federal Communications Commission, Washington, D.C. 20554, by a date certain; and that they should set forth in detail *specific facts* which they wish the Commission to consider.

[9] The IFC advanced several other arguments in support of its request for waiver of Section 1.580(i). None of these arguments, however, provided good cause for extending the prescribed cut-off date. Hence, while the IFC asserted that each stations' Annual Employment Report (FCC Form 395) was not on file, at the time the IFC filed its letter licensees were not required to file such a report. Additionally, the IFC maintained that the Commission's Detroit Field Office could not handle its requests since it is simply an engineering office, and that its efforts to obtain copies of the completed license renewal applications had been delayed by lack of prompt replies due to summer vacations and office backlog. See 47 C.F.R. 0.465(a).

facts substantiating its charges. Absent detailed and specific facts in a complaint, it is unreasonable to expect (i) licensees to devote extensive man hours to cull over his programming to disprove general allegations, and (ii) this agency to make specific findings on each non-specific allegation. The public interest requires some reasonable specificity in a complaint and members of the public challenging a license renewal application must do more than make general and conclusory allegations. 47 U.S.C. 309. We do not mean to imply that members of the public must prove their cases ahead of time; however, complainants are expected to provide a showing of some reasonable basis for the action requested. There are 8,230 licensed radio and television stations in the United States. During fiscal year 1972 the Commission received approximately 44,681 complaints, comments and inquiries concerning these stations. If we were required to make detailed findings on every complaint where specific facts are not explicitly stated, our administrative task would be enormous. Rather, absent such a showing, it is sufficient to characterize the allegations as general and conclusory in issuing a ruling. We conclude, therefore, that the Bureau did not commit reversible error in its failure to issue specific findings on *each* of the IFC's non-specific allegations.

20. In addition to the above, the IFC also seeks reversal of the action taken by the Chief, Broadcast Bureau on January 20, 1970, granting Storer's application for renewal of license for WJBK–TV. By way of summary, the IFC maintains that this grant should be rescinded and, thereafter, the application designated for hearing on the grounds that Storer has failed to adequately ascertain the needs and interests of Detroit's black population and to present sufficient programming serving that community.

21. With regard to ascertainment of black interests, the IFC asserts that Storer has not consulted a substantial number of representative spokesmen for the black community. The IFC concedes that a number of blacks are included in Storer's survey, but it is alleged they are "persons who are dependent upon the good will of the *white* population and the mass media for their present livelihood." Therefore, the IFC concludes "that there is little likelihood that the individual would be critical of the interviewer." In opposition, Storer points out that this allegation "is purely subjective and without foundation in fact." Storer states that of 150 leaders interviewed, 24 were blacks representing a broad base of individuals. Furthermore, Storer states that, in addition to the personal interviews of community leaders, it conducted a mail survey of 4,297 community and organization leaders in its area, many of whom represent black organizations or deal with matters of particular interest to the black community. Finally, Storer submits that it must be assumed that a portion of the persons answering its general public survey were black, since 251 of the responses were from Wayne County which is composed primarily of the City of Detroit. The IFC replies that its allegations are not wild assumptions, but are based upon experience with Storer such as the coercive contacts Storer made with sponsoring and supporting groups of the IFC. The IFC also states, in reply, that Storer's assumption that a portion of the 251 responses to the public survey

were black is "gross speculation without any basis in fact, and is contrary to what is known about responses to mailed surveys."

22. The IFC also attacks the method used by licensee to determine community needs and interests. Thus, it notes that the management and control of the surveys rests with five station executives who are all white and who all live outside of the City of Detroit. The composition of this group, according to IFC, raises a question of its ability to reflect minority interests, its objectivity and its sensitivity. Of the 152 personal interviews, the IFC claims that two names are duplicated. Furthermore the IFC challenges the validity of an interview with U.S. Senator Robert P. Griffin, since his home is Traverse City, Michigan, and since he spends a principal part of his time in Washington, D.C. This interview, according to the IFC, raises a question of the credibility of the personal interviews. Moreover, the IFC notes that its examination of the 150 personal interviews reveals that 37 are public officials and 47 represent special interests. This finding, according to IFC, puts the interview results in doubt since the "assumption that such persons reflect the opinions of their constituency is wholly unwarranted." Finally, the IFC states that there is no information as to how the leaders were selected. Therefore, the IFC concludes that they were not randomly selected and, thus, are not representative insofar as statistical analysis is concerned.

23. Storer, in opposition, contends that the allegations concerning those who conducted the interviews "is about as relevant as the fact that the thirty IFC representatives who conducted the WJBK–TV 'monitoring study' are white." Storer further submits that "the charge itself is racist and preposterous." Storer states that Senator Griffin is greatly involved with Detroit's problems and that he maintains a fulltime, staffed office in Detroit. Storer admits that the leadership portion of its survey did, in fact, deal with leaders. As to the selection of leaders on a random basis, Storer points out that the *Primer on Ascertainment of Community Needs*, 27 FCC 2d 650 (1971), specifically reflects the need for statistical validity in relation to the leader survey, but requires only that leaders from each significant element of the community be consulted. Challenges to such a survey, according to licensee, must show, by means of supporting data, that a significant group has been omitted. Licensee submits that the IFC has failed to make such a showing. Furthermore, Storer emphasizes that an examination of the list of those who were personally interviewed and of the list of those who received written questionnaires make it readily apparent that no significant group was left out.

24. The IFC alleges, in reply, that Storer has not sought out representatives among the least organized members of the black community but, rather, has interviewed mostly government employees and officials. It is alleged that Storer has ignored the black business and professional communities, and community and neighborhood organizations. The IFC also submits a partial list of people omitted from the survey. The IFC further alleges that it contacted most of the 24 individuals interviewed by the licensee as representatives of the black community. A summary of each of these contacts is included which, according to IFC, indicates that on many occasions the interviewee did not know or understand the use WJBK–TV was to make

of his name. Storer, in its response to IFC's reply, contends that the allegation that those interviewed were not informed of the purpose of the interview is based on hearsay.

25. The IFC next challenges Storer's survey of the general public on the grounds that only 354 persons out of a primary viewing area of over four million people responded by returning questionnaires to the station. It is also suggested by the IFC that the validity of this sample is questionable, since persons responding were self-selected. Similar allegations are made in regard to the survey in which requests were sent to 4,397 persons to answer a questionnaire. The IFC states that only 581 persons responded and charges that this is a small number compared to the total population of the area. The IFC also states that there is no information on the pattern or distribution of those responding. This type of response, according to the IFC, raises the problems of self-selection and exaggeration of results. It is also submitted by IFC that licensee's failure to make some estimate of the non-response calls into question the licensee's sincerity in seeking public opinion. The IFC suggests that the mail survey may be invalid, since it contained a "General Checklist." According to IFC, the sending of a checklist has three results: "(1) It tends to communicate the kind of response which the station *approves;* (2) It tends to discourage responses from those who perceive things differently; and (3) It completely ignores problems existing between races, and fails wholly to define problems in terms which are recognizable by minority groups." The IFC notes that Storer speaks of 1,087 persons participating in its survey. According to the IFC, however, the three samples are not comparable and cannot be added. Finally, the IFC charges that licensee's "interest was not one of assessing viewer opinion, but one of justifying its own continued lack of service."

26. In opposition, Storer submits that the IFC, by its allegations, reveals its misconception of the purpose of a community survey, which is to ascertain problems, not viewer program preferences or opinions concerning a station's service. In response to the allegations concerning the statistical validity of its survey, Storer again points out that the Commission's Primer does not require statistical perfection. Nevertheless, it submits that comparison of the results of the survey conducted for its renewal application with the results of a professional survey completed in November 1969 confirms the results of the three-part survey made for renewal purposes. Finally, Storer notes that "IFC has made no challenge to the specific problems revealed by WJBK–TV's survey, or to the programs, editorials, and announcements which it proposes to carry in response to these problems." Storer concludes that petitioner has failed to raise an issue with respect to its ascertainment of community problems.

27. In its reply, the IFC asserts that there are several errors in the lists of persons surveyed which call into question the validity of the entire survey. For example, IFC cites two names which are duplicated between the Personal Interview List and the Mail Contact List. Moreover, it is alleged that the mail contact list contains errors. Thus, it is stated that at least two individuals are no longer associated with the organization which they allegedly represent. It is

suggested that there may be other "errors," and that a hearing is required to examine the true nature of "this so-called Community Survey." The IFC also alleges that while Storer lists "Race Relations" as the most significant problem, it lists only two programs to be broadcast on "TV 2 Reports" to deal with this problem. It is submitted that one reason the proposed programming bears little relevance to community needs is that the community survey is invalid, and may be fraudulent. With regard to the method used in Storer's survey, the IFC contends that staff members of the Institute of Social Research, University of Michigan, informed it that Storer's description of the survey method is meaningless and that, if such a method were followed, the results would have no validity.

28. The Commission has stated that the principal ingredient of the licensee's obligation to operate in the public interest is the diligent, positive, and continuing effort to discover and fulfill the tastes, needs, and desires of his community. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 25 Fed. Reg. 7291, 7294 (1960) (*1960 Programming Policy Statement*). In order to determine whether the licensee has met this obligation, the Commission designed Section IV–A (radio) and Section IV–B (television) of Part I of the renewal application to require the licensee to state the methods he used to ascertain his community's needs and interests (*i.e.*, problems), those problems which his station plans to meet during the coming license period, and typical and illustrative programs which he will present to meet those problems.[10] In a *Report and Order*, released February 23, 1971, the Commission adopted a *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, wherein we sought to clarify our policies and provide guidelines for the fulfillment of our requirements with respect to the ascertainment process. The *Primer* prescribes the methods a licensee must employ to ascertain the needs and interests of his community. Briefly stated, he must consult with the leaders of the significant segments that comprise the community and with a random sample of the general public. The purpose of these consultations is to elicit from the interviewees what they believe to be the problems faced by the community. Having completed the surveys, the licensee must list the problems ascertained and then evaluate them to determine which problems merit treatment by the station. Finally, the licensee must propose programming designed to meet those problems.

29. A review of the application for renewal of license for WJBK–TV discloses that Storer management personnel interviewed 152

[10] With regard to these reporting requirements, the Commission, in August 1968, issued a *Public Notice* to provide broadcast applicants "with a better understanding of the showing called for in response to Part I, Sections IV–A and IV–B." Ascertainment of Community Needs by Broadcast Applicants, FCC 68–847, 33 Fed. Reg. 12113, 13 RR 2d 903 (1968). Thereafter, further clarification was requested on the grounds that conflicting interpretations were being given to the Commission's standards. See *Minshall Broadcasting Co.*, 11 FCC 2d 976 (1968); *Andy Valley Broadcasting System, Inc.*, FCC 68–290, —— FCC 2d —— (1968); *Sioux Empire Broadcasting Co.*, 16 FCC 2d 995 (1969); *City of Camden*, 18 FCC 2d 412 (1969). Thus, on December 19, 1969, the Commission issued a *Notice of Inquiry and Proposed Primer on Ascertainment of Community Problems by Broadcast Applicants*, 20 FCC 2d 880. Then, by *Report and Order* released February 23, 1971, the Commission issued its final version of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650.

community leaders [11] and received written responses from 581 other community organizations and 354 members of the general public in an effort to ascertain community problems. As noted above, IFC maintains that, despite these efforts, Storer has failed to conduct an adequate community survey. The IFC's arguments "focus" on the methods used by Storer in conducting its survey and the number, character and affiliations of the persons interviewed. Licensees are afforded wide discretion in selecting from among the many leaders of each significant group found within the station's service area. There is no magic formula for determining the correct number of community leaders and members of the general public to be interviewed. *Universal Communications Corp.*, 29 FCC 2d 1022 (1971). What is required is that the licensee make reasonable and good faith efforts to consult with a broad cross section of community leaders and members of the general public distributed throughout its community of licensee. Here, Storer has leaders representing government, education, religion, charitable and social organizations, welfare, youth, senior citizens, health and safety, the handicapped, consumers, community improvement, civic clubs, women's organizations, etc. Of the personal interviews conducted, 24 were black leaders representing groups such as the Wayne County Community College, the East Side Voice of Independent Detroit, the NAACP, the Detroit Commission on Children and Youth, the Mayor's Committee for Human Resources Development, etc. Additionally, Storer received written responses to its mail survey from 581 other community organizations, 181 of which apparently concern themselves with matters of interest to the black community. We will not disturb Storer's selection of these interviewees, particularly in the absence of specific facts which would establish that the licensee abused its discretion. *Miners Broadcasting Service, Inc.*, 20 FCC 2d 1061 (1971). Further, persons challenging a renewal survey showing must do more than make general allegations concerning the number and affiliation of the persons interviewed: they must show, by means of supporting data, that a significant group has been omitted. *WSBC Broadcasting Company*, 33 FCC 2d 651 (1971); *Primer, supra*. Neither showing has been made here. We have before us an assertion that other black leaders should have been interviewed. Other black leaders could have been interviewed. However, this fact does not render an otherwise valid survey deficient. Indeed, if this was the test by which a survey was to be evaluated then no survey could withstand the Commission and the public's scrutiny, unless of course, the applicant interviewed all leaders of every significant group found within the station's service area.

30. Further, the purpose of the survey requirement is to ascertain community problems; it is not designed to elicit viewer opinion concerning the station's programming or to give the interviewee an oppor-

[11] IFC, in its petition, notes that the names of two community leaders are duplicated in Storer's listing of persons interviewed (Petition, p. 17). However, we do not agree with IFC that this error raises a question as to the credibility of Storer's ascertainment efforts. In short, the duplication of Senator Griffin's and Carl Purcells names is apparent on the face of WJBK–TV's renewal Exhibit A–5; consequently, we are unable to conclude that such an obvious error demonstrates either "lack of candor" or "intent to deceive," particularly when viewed in light of the licensee's over-all ascertainment efforts. See *Southern Broadcasting Company (WGHP–TV)*, 31 FCC 2d 661 (1971). Similarly, the fact that several community leaders whom Storer sought to contact may no longer be associated with the organizations they formerly represented does not raise a material or substantial question concerning either the credibility or the validity of the licensee's surveys.

tunity to criticize the interviewer. We must also reject IFC's contention that only whites can interview and understand whites, blacks, blacks, etc. *Time-Life Broadcast, Inc., et al.*, 33 FCC 2d 1099 (1972). Finally, the IFC has failed to offer affidavits of any of the individuals supposedly contacted in support of its contentions that some of them did not remember being interviewed, or did not understand the purpose of the interview, or would have given the interviewee different answers had they known the interviewer was associated with WJBK–TV. On the other hand, Storer has submitted in an affidavit the date each interview was conducted, the place of the interview, and the person conducting the interview. It is also submitted, by affidavit, that "each interviewer was careful to inform the interviewee, at the outset, of the interview's purpose, i.e., for use in a community problems survey in connection with Storer's applications for renewal of its Detroit television and radio licenses before the Federal Communications Commission." There is, of course, no requirement that separate surveys be conducted when more than one station is owned by the same licensee in the community. Such a requirement would result in an unnecessary duplication of effort.

31. Concerning Storer's general public survey, it is noted that Storer broadcast a number of editorials requesting public participation in its ascertainment efforts; and, as a result of the contacts arising from these editorials, mailed survey questionnaires to 850 individuals, 354 of whom responded. In adopting the *Primer, supra*, we stated that a sampling technique wherein the persons whose views are sought is to voluntarily return a questionnaire by mail may produce a strong cooperation bias that renders almost meaningless the information gathered by this method. *Primer, supra*, at 668. Thereafter, we modified this position stating that the mail return questionnaire may be used if the applicant submits an appropriate showing that this method resulted in responses from members of the general public who are generally distributed throughout the community to be served. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 33 FCC 2d 394, 305 (1972). The pleadings disclose that of the 354 questionnaires returned to Storer, 251 were from Wayne County (Detroit), 26 from Macomb County, 64 from Oakland County, and 28 from the counties of Ingham, Genassee, Lapeer, Livingston, Shiawassee, St. Clair and Washtenaw (Opposition, p. 16). Hence, it appears that Storer has surveyed numbers of the public generally distributed throughout the station's service area; no information has been submitted to indicate otherwise. We recognize, of course, that the procedure utilized by Storer may not be acceptable to a professional statistician. However, we do not hold broadcast licensees to professional standards. Licensees, it must be recognized, do not possess the same expertise as professional research organizations.

32. Upon the basis of the above, we do not believe that adequate reasons have been advanced to justify designating for hearing Storer's application for renewal of license for WJBK–TV to explore its ascertainment efforts. Storer's survey and the subject renewal application were filed with the Commission prior to the adoption of the *Primer, supra*. Nonetheless, we believe that Storer has substantially complied with the Primer's requirements. The Commission requires a *bona fide*

effort by licensees to inform themselves of community problems. Here, Storer has conducted the required community leader and general public surveys, has analyzed and evaluated the problems ascertained through these surveys, and has proposed programming designed to deal with those problems it has determined merit treatment by its station. In this latter connection, it must be recognized that not all problems ascertained merit or can be dealt with through broadcast programming. Accordingly, the licensee is accorded wide discretion in determining the problems to be met by his station and the choice of programming to meet those problems. Without a *prima facie* showing that the licensee has abused its discretion in determining the problems to be met and in selecting programming to meet community problems (e.g., fails to meet a substantial number of problems, or refuses in bad faith to meet a significant problem), no substantial or material question of fact is presented which would require a hearing. "[H]e may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote twenty per cent of its broadcast time to meet the need expressed by twenty per cent of its viewing public." *Stone* v. *F.C.C.*, 466 F. 2d 331 (1972). It is, therefore, concluded that Storer has adequately ascertained community problems and that it will program WJBK–TV to meet those significant problems it has determined may merit broadcast treatment.

33. With regard to WJBK–TV's programming, the IFC contends that its past programming of 2.2% in the public affairs category is deficient on its face. Moreover, it is submitted that licensee's proposal indicates a reduction to 2%. This compares, according to the IFC, to 4% proposed by WWJ–TV and 7% proposed by WXYZ–TV. Of this 2% proposal, the IFC submits that all, or nearly all, of this time will be consumed by network programming, rather than by programs serving local problems. The IFC states that this is confirmed by licensee's Renewal Application Exhibit C, which lists only the following locally originated public affairs programs for the composite week: "Job Opportunity Line," a thirty minute weekly show; "WJBK Editorials," two minute statements of the station's point of view four times per day; and "Editorial Feedback," two minute statements of viewers' opinions, four times per week. The IFC also alleges that most of the programs which WJBK claims as public affairs programs are only three to five minute segments of news program, noting in this connection, that it monitored WJBK–TV from September 3, to 12, 1970, and did not detect any local public affairs programs which it considered "specials." Finally, the IFC contends that the WJBK–TV editorials are "*constantly repeated propagandizing* of a set point of view without meaningful opportunity for fair presentation of facts, balanced presentation, or representation of opposing points of view."

34. Storer submits, in its opposition, that percentage comparisons with WWJ–TV and WXYZ–TV are misleading, since WJBK–TV proposes more total broadcast hours per week than either of the other two stations. Furthermore, Storer states that the IFC's allegation that WXYZ–TV proposes 7% public affairs is not true. Rather WXYZ–TV's 1970 renewal application indicates a proposal for 3% public affairs. Storer also contends that a comparison between stations of hours proposed in the category of public affairs is subject to varia-

tion due to the different methods of classifying programs. For example, Storer often classifies CBS specials as "News" when they could also correctly be classified as "Public Affairs." During the period of the IFC monitor study, Storer contends that it classified five CBS specials as "News." The program "Black Heritage" was classified as "Instructional," but it could have been correctly classified as "PA." In addition, Storer submits that there is no percentage requirement for particular classes of programs. Thus, it is suggested that better public service might result "in preparing a finely honed two-minute editorial on a significant problem, than in putting on an hour-long undifferentiated discussion." With regard to program proposals, Storer contends that it usually is conservative in its proposals and usually exceeds them in practice. As to petitioner's allegation that it had encountered no local public affairs specials during its monitor period, Storer submits that a local special was broadcast in prime time on September 2, 1970, the day before the monitoring began. Other local public affairs programs broadcast during the monitor period, according to licensee, were "Job Opportunity Line," "Editorials," and "Editorial Feedback." Licensee also states that it regularly produces a thirty minute local public affairs special which is usually seen weekly. This was the program which was broadcast the night before the monitor study began. In order to demonstrate WJBK–TV's commitment of response to community problems, Storer has submitted an exhibit listing its locally produced public affairs specials telecast in prime time during the last year of its license period, a list of public affairs special reports carried within newscasts from February through August 1970, and a list of editorials and programs broadcast during 1969 and January–March 1970 which related to problems ascertained in the community survey. Storer also calls attention to Exhibits D and F of its renewal application, which set forth the bulk of its past programming showing. Storer contends that the IFC's allegation, that its editorials are merely repetitive propaganda without meaningful opportunity for representation of opposing points of view, is not true. Its program "Editorial Feedback," carried on Saturdays and Sundays, is made up entirely of viewer opinions on issues treated by WJBK–TV's editorials. Licensee also states that it frequently carries replies to its editorials. "From October 1969 through September 1970, it carried thirty-three editorial replies, twenty-four of which represented minority viewpoints, and ten of which were presented by blacks." To indicate the irresponsibility of IFC's charges, Storer submits copies of editorials broadcast during the IFC's 10-day monitor study.

35. In reply, the IFC submits that Storer's statement that there are different methods of classifying programs amounts to a statement that classifications are manipulative. As an example of Storer's manipulation, IFC states that Storer classified the "Phil Donohue Show" as entertainment, instructional, and public affairs on three different days in the period from September 3, to 12, 1970. The IFC also denies licensee's innuendo regarding the selection of the monitoring period, and alleges that this is an attempt to camouflage Storer's lack of public affairs programming during that period. Thus, the IFC repeats its assertion that only three local public affairs programs were broadcast during the composite week. Petitioner also alleges that "The Hijack

Conspiracy," which Storer says was broadcast on September 9 and 12, was shown only on September 12. On September 9, it is alleged that a motion picture was shown at the time which WJBK–TV says it broadcast "The Hijack Conspiracy." This discrepancy suggests inaccuracies in WJBK–TV's records and, according to petitioner, warrants further Commission investigation. It is also alleged that of the five "Editorials" reproduced on pages 24–28 of the opposition, only one is actually an editorial. Moreover, none of the material deals with racism or race relations. Of the 43 locally produced prime time public affairs programs listed by licensee in its opposition, IFC alleges that there are none which deal with the priority issue of racism and race relations.

36. In answer to the allegation that "The Hijack Conspiracy" was not telecast on September 9, Storer submits evidence which it contends proves the CBS special was, in fact, shown. Storer states:

> The probable explanation of this astounding error lies in the fact that the CBS Special involved a last-minute scheduling change, having been ordered by CBS the day it was to be telecast . . . WJBK–TV's acceptance of the program caused it to delay the previously-scheduled Late Show from approximately 11:45 p.m. without sufficient time to notify the newspaper of the change . . . Consequently, anyone taking the WJBK–TV schedule from the newspaper listing would think that the late show commenced at about 11:45 p.m. and that the CBS Special was not scheduled or carried.

37. The IFC next charges that "WJBK–TV has consistently followed a course of programming which is calculated to excite racial feeling and passion, emphasize minority group association with violence, reinforce stereotypes of Negroes, and demean Black people as social problems." This charge is based upon IFC's monitor study conducted September 3 through September 12, 1970. The IFC states that, during this period, it monitored 81.9% of WJBK–TV's total broadcast time, 150 hours and 19 minutes out of 183 and 19 minutes. The IFC states that it derived several conclusions from this study. First, it was determined that the most worthwhile programs were carried in the early dawn hours when there are few viewers watching. It was also determined that only five programs were broadcast which could be classified as public affairs. With regard to news reporting, it is alleged that the monitor study produced evidence that WJBK–TV tends to select news and report it in such a manner that associates minorities with violence and excites racial feeling and conflict. For instance, it is noted that "a poster of a *black clenched fist* is displayed prominently during news reports of black individuals and groups." IFC also alleges that on September 4 and 5, 1970, WJBK–TV carried 27 minutes of news devoted to the Black Panther convention. The IFC contends that this constitutes grossly disproportionate emphasis on that event. IFC further alleges that of 1,394 commercials viewed, non-whites appeared in only 88, or 6.3%, and many of those were token appearances. In WJBK–TV's entertainment programming, IFC alleges that an analysis of 138 programs showed no minority group participation in 100 of them, and that, while there was token participation in 36 programs, in 41 per cent of these programs there were derogatory references to minority group persons. For example, IFC states that "Cartoon Carnival" depicts blacks as cannibals; that "The Movie Game" is composed of an entirely white staff, that questions on this program show

a strong white bias, and that only token use is made of the most prominent black actors. Several movies are also criticized.

38. Storer, in opposition, states that IFC's "so-called monitoring was so inept as to be worse than useless." First, licensee alleges that the IFC monitor study misstated the actual number of hours broadcast by WJBK–TV during the monitor period. Thus, 208 hours and 55 minutes were actually broadcast, 25½ hours more than reported by the IFC. Moreover, licensee states that the IFC itself has conceded that it omitted 33 additional hours from its monitor study. Therefore, Storer concludes that the monitors did not view 28% of WJBK–TV's total broadcast time. Furthermore, licensee states that the period chosen for the monitor study is not representative, since it was at the end of the summer season and also included a holiday weekend, "during which much of the audience might be expected to be away, as well as a sizeable portion of the station's production and programming staff." Storer also questions the qualifications of those conducting the monitor study and asserts that the terms used in their report "do not comport with FCC definitions or known standards." Several errors were made in the monitoring which licensee contends were then made the basis for inflammatory charges. For example, the IFC alleged that on September 4 and 5, WJBK–TV carried 27 minutes of news relating to the Black Panther convention. However, Storer submits that its news scripts for those days reveal that only six minutes and forty seconds were devoted to that subject. Another error concerned the IFC allegations that the WJBK–TV editorial policy is one-sided and does not permit presentation of opposing views. Storer contends that it has adequately demonstrated the falsity of this charge. It is also alleged that the IFC calculations of time broadcast in the categories of news, public affairs, and "other" are far from correct. It submits its own calculations for comparison. With regard to the allegations of bias in its commercials, Storer contends first that it does not produce commercials and has no control over the talent or content of commercials. Secondly, it is submitted that many commercials contain no persons, so that percentages of commercials containing minorities are meaningless. Storer also states that the IFC has submitted no breakdown as to local or network commercials. In opposition to the allegation concerning a lack of black representation in its programming, Storer lists several programs carried during the monitor period including two all-black entertainment programs in prime time, an all black public affairs program, and an all black religious music program. Storer contends that the alleged token representation of 36 programs is based upon IFC's definitions, which "make clear that it regards anything less than 100 percent representation as 'token'." Thus, Storer submits that "IFC's wholly subjective disagreement concerning proper 'mix' is insufficient to raise a substantial or material issue of fact. Evening Star Broadcasting Co., 20 RR 1311 (1971)." Storer further denies any knowledge of derogatory references made to minority group persons in ten programs referred to by the IFC, and notes that this allegation is unsupported by facts. Storer contests the validity of IFC's conclusion that five program and three movies contained biased treatment of minority group members. As to its news reporting, licensee contends that the allegation that it broad-

cast 27 minutes on the Black Panther convention is "sheer fiction," the actual time being six minutes and forty seconds.

39. Furthermore, licensee defines the use of a black clenched fist in connection with stories of revolutionary or militant groups stating that such use merely constitutes a "re-portrayal of the symbol which the groups themselves designate as their mark." Storer also submits that "the allegation that WJBK–TV selects blacks for news coverage almost exclusively from the militant fringe is totally incorrect." To support this contention, Storer submits a list of news stories carried during the monitor period. Storer also denies the truth of the allegation that its one black reporter drew only controversial assignments. Licensee also submits that it employed two black on-the-air reporters until September 1970, and that, in the past, it has "trained and 'graduated' several others to important jobs elsewhere." Storer rejects any suggestion that news should be managed, doctored or suppressed, so that all racial feeling is eliminated. It submits that its coverage of events which may excite racial feeling and conflict is objective, fair, and balanced.

40. The IFC characterizes Storer's response to the charge of bias as "a vitriolic personal attack on the monitors and their study." IFC asserts that it limited the information concerning the monitor study in an attempt to abide by the page limitation for petitions for reconsideration. IFC explains the discrepancy between its time figures and those of the licensee by the fact that its monitors terminated viewing at 1:00 a.m., since it was believed that nothing worthwhile would be shown after that hour. Petitioner also denies the implication that it chose the monitor period because it was atypical. It is alleged that Storer's attack on IFC's monitors is "unnecessary, unwarranted, and unfounded, and as such must be assumed to be malicious." IFC also submits that Storer's attempt to avoid responsibility for commercials by stating that it has no control over their production is irrelevant. IFC states further that it made an unintentional error in computing the time devoted to reports concerning the Black Panther convention. It alleges that the correct amount of time devoted to that subject on September 4 through September 6 was 10 minutes and 22 seconds. Even this amount is excessive, according to IFC, and represents disproportionate coverage of violence in the black community. With regard to its charge that WJBK–TV does not have sufficient black representation in its programming, IFC contends that two of the all black shows listed by Storer in its opposition are irrelevant to the charge since they are religious in nature and are broadcast during insignificant time periods. With regard to WJBK–TV's use of a black clenched fist in news reports concerning militant groups, the IFC "vehemently" denies that a black clenched first is the symbol of all black activist groups. IFC alleges that WJBK–TV uses the symbol to convey its own message when the news story will not support such interpretation. One of the examples cited in support of this allegation was the use of the black clenched fist on a news report concerning a peaceful sit-in in Ann Arbor churches. The IFC further alleges that the list of news stories carried during the monitor period is not responsive to the charge that WJBK–TV selects blacks for news coverage from the militant

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fringe, and is also "inaccurate, and distortive." It is alleged that the news stories described were not actually shown on days and times set forth. Several examples in support of this charge are listed. The IFC alleges that Storer has distorted the descriptions of news stories covered by WJBK–TV's black reporter Joe Williams. Thus, IFC alleges that Storer's exhibit confirms rather than denies the IFC's charges.

41. In response to IFC's reply, Storer denies that its exhibit of news stories is untrue or inaccurate. The exhibit, according to Storer, was "to indicate only those news stories that were black community-oriented and non-violence oriented," and was submitted ". . . to rebut IFC's false allegation that it carried only violence-oriented black news designed to frighten whites." To counter the allegation that this exhibit was inaccurate, Storer submits copies of newscripts for the days in question.

42. In opposition to the allegation that WJBK–TV fails to present significant programming of interest to the black community, Storer submits that the allegation is unsubstantiated by any factual showing and is not discussed in the petition. Nevertheless, to counter this allegation, Storer lists a number of programs carried during the monitor period which were of particular interest to the black community or were of interest to the black community as well as other elements of the community. In addition, licensee submits a list of editorial topics directly related to inner-city problems which were carried from October 1969 through September 1970. Storer emphasizes that it does not believe it is "either desirable or feasible to segregate out from its programming what is 'black' and what is 'white'." Furthermore, it contends that, if indeed, it were a racist station, it would not find favor with the black community. It is submitted that, on the contrary, professional research has established that WJBK–TV is the black community's favorite station.[12]

43. The IFC submits that Storer's opposition is not responsive to the allegations raised concerning programming of interest to the black community, since the IFC did not allege that WJBK–TV presented no such programming. IFC alleges that Storer's list of programs of interest to the black community, which assertedly includes baseball and football games, is "ludicrous and insulting" and "is revealing of mentality which stereotypes blacks as interested only in the pablum of entertainment or singing spirituals." As to the survey conducted by Independent Research Associates, Inc., IFC states that, in view of the doubtful authenticity of licensee's other surveys, it is dubious of this one. Moreover, it is submitted that the survey is "irrelevant because the charge is that 'WJBK–TV has failed to convey to members of its white audience the problems, feelings, frustrations, experiences, and difficulties of being a minority race in a predominately white country, and has thereby exacerbated the serious racial tension in the City of Detroit.' "

44. Licensee contends that the allegation that WJBK–TV does not employ a significant number of members of the minority races

[12] The basis for this conclusion is a study conducted during July–August 1970 by Independent Research Associates, Inc., for McHugh and Hoffman, Inc., Television and Advertising Consultants, Birmingham, Michigan, as commissioned by WJBK–TV.

in supervisory, policy making, and managerial positions is also false and unsupported by any factual showing. Storer submits that as of April 1, 1970, WJBK–TV employed 212 persons, of which 34 are blacks. Of this number licensee notes that three blacks are in the "officials and managers" category, four blacks are in the "professional" category, three blacks are "technicians," thirteen blacks are "office and clerical," one black is a "craftsman (skilled)," and ten blacks are "service workers." WJBK–TV, it is submitted, follows an open and equal employment policy, a copy of which is submitted as an exhibit. It further contends that it also conducts an apprentice training program for black inner-city students.

45. In reply, petitioner alleges that Storer's employment data is irrelevant and immaterial, since it refers to data compiled eight months after notice of IFC's complaint. As to the licensee's reference to its training program for black inner-city students, the IFC contends that the program is more accurately described as an "orientation to work habits." This program, it is alleged, is a belated effort to upgrade after the filing of the complaint.

46. In order to counter the charge that WJBK–TV is a racist station, the licensee submits a list of various contributions made by the station to the community. Included in this list are donation of goods, services and money to various activities and organizations in the city. The IFC, on the other hand, contends that charity has nothing to do with racism and that the data concerning Storer's charitable contributions is irrelevant and should be stricken.

47. To qualify for renewal, a licensee must show that during the past license term he has broadcast programming responsive to community problems, needs and interests. See *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (1966). As previously noted, the licensee is afforded wide discretion in its choice of programming to meet community problems, needs and interests. The Commission cannot condition the grant or denial of renewal of license upon a subjective determination of what is or is not a good program. That is, neither the Commission nor license challengers can act as a board of censors over a program broadcast by the licensee. 47 U.S.C. 326; see also *Public Utilities Commission* v. *Pollack*, 343 U.S. 451 (1952). Our decision must be based on an analysis of the responsiveness of the licensee's overall programming performance. Without a *prima facie* showing that the licensee has abused its discretion in programming, (e.g., failed to meet a substantial number of significant problems or followed a pattern of program exclusion, *WSNT, Inc.*, 27 FCC 2d 993 (1971)), no substantial and material question of fact is presented which would require an evidentiary hearing.

48. No overall abuse of discretion has been shown here. Indeed, the programs, editorials and other matters listed in WJBK–TV's renewal application and the opposition pleading demonstrate that Storer's past efforts have been significantly responsive to community problems, needs and interests, and that it has acted reasonably and in good faith in exercising its programming discretion. Stripped of its rhetoric, the instant petition does not show the contrary. Rather, central to the petition is a concept that only minorities can communicate with minori-

ties and that programming concerning problems affecting minority communities is only relevant when largely featuring minorities. Clearly, if a licensee chooses to produce programming exclusively for minorities he may do so and we in no way mean to imply that there may not be a need for such programming. However, it must recognized that television and radio broadcasting as a mass communications media must seek to strike a workable balance of programming which has diverse and wide spread appeal for all segments of the population. Apparently, however, the IFC believes that a program which is devoted to a problem or community need which concerns Detroit residents in general, rather than blacks in particular, should not be treated as broadcast matter serving black needs. Such a distinction has not been sanctioned by the Commission, for we have stated that,

> many types of programming cannot be broken down into that for Black people and that for others. Were the Commission to require such a breakdown of programming according to the racial composition of the city of license, we would effectively be prohibiting the broadcast of network and other nationally presented programming. Without addressing ourselves to the legality of such a requirement it is sufficient to say that such "separate programming" is not feasible. See also our discussion of this matter in *Capitol Broadcasting Co.*, 28 FCC 1135 (1965). *The Evening Star Broadcasting Company*, 27 FCC 2d 316, 332 (1971), *aff'd sub nom. Stone* v. *F.C.C., supra.*

49. Licensees are faced with many conflicting and competing needs of the various elements found within their service areas. How they respond to those needs is a matter left largely to their discretion. The facts before us do not indicate that Storer has ignored the needs of the public, including the black population, within WJBK–TV's service area. Exhibits C, D and F of the subject renewal application list and provide brief descriptions of numerous public affairs and other non-entertainment programming broadcast by WJBK–TV during the past license term which have served public needs and interests. We do not believe that it is necessary to set forth Storer's program showing here; Exhibits C, D and F speak for themselves. We would point out however that a number of these programs have featured and/or pertained to matters of interest to blacks. We would also point out that the IFC has failed to present us with information which establishes that Storer has either failed to meet a substantial number of significant community problems, needs and interests, or refused in bad faith to meet a significant community problem, or followed a pattern of program exclusion. In short, IFC concerns have failed to raise a substantial or material question of fact to make out a *prima facie* case that renewal of WJBK–TV's license would not serve the public interest, convenience and necessity. In attempting to make a *prima facie* case, license challengers cannot rely upon unsupported conclusions, assertions of subjective judgment, and matters of policy raising questions related to the broadcast industry as a whole and which are not peculiar to the station in question. To a large extent, this is precisely what the IFC has attempted to do. IFC has not met its burden of establishing with factual information that WJBK–TV has excluded blacks, black views, or

their perspectives. Consequently, as to these allegations, the petition must be dismissed.

50. The IFC also expresses objection to the amount of time WJBK–TV has devoted to public affairs programming. Broadcasters are called upon to exercise their prudent judgment in determining the problems, needs and interests of the communities they are licensed to serve, and the amount, kind and time periods during which programming should be presented to provide for those problems, needs and interests. *Time-Life Broadcast, Inc.* (KLZ–TV), FCC 72–221, 33 FCC 2d 1081 (1972). In this respect, the Commission does not make its public interest determination on the basis of a comparative ranking of stations in a market. Such a determination is made on the basis of each individual licensee's overall performance. *The Evening Star Broadcasting Co., supra.* The bare allegation that a certain percentage of public affairs programming is not sufficient does not make out a *prima facie* case that the licensee has failed to serve the public interest. It is the licensee who must determine what percentage of the limited broadcast day should appropriately be devoted to non-entertainment programming—i.e., news, public affairs, and all other programming, exclusive of entertainment and sports. Here, WJBK–TV devoted 6.7 per cent of its broadcast day to news, 2.2 per cent to public affairs, and 8 per cent to all other programming, exclusive of entertainment and sports. Absent specific facts that the licensee has ignored a substantial number of community problems, needs and interests, we will not question his good faith judgment in attempting to attain a reasonable balance between non-entertainment and entertainment programming. We also submit that the IFC's argument concerning the amount of time which should be devoted to a certain category of programming is more appropriately the subject matter of a rule making proceeding. (See, e.g., Notice of Inquiry, Docket No. 19153, Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, 27 FCC 2d 580 (1971), wherein we are considering proposed guidelines for the comparative hearing process.) In the context of the instant proceeding, however, the IFC has the burden of demonstrating specifically a substantial issue or issues with respect to Storer's alleged failure to serve the public interest. No such showing has been made here.

51. Other objections raised by the IFC relate to (i) Storer's editorials, (ii) programming which allegedly incites racial feelings, (iii) the participation of blacks in entertainment programming and commercials, and (iv) the broadcast of the program, *The Hijack Conspiracy.* We have carefully reviewed each of these allegations and the licensee's responses thereto, and have concluded that none of them raise a substantial and material question of fact concerning Storer's qualifications for renewal. The dispute before the Commission concerning these matters does not appear to be one of fact, but, instead, inferences, interpretations and conclusions the IFC draws from the facts alleged. Further, several of the allegations raise exactly the kinds

of questions the Commission is barred from considering under the First Amendment and Section 326 of the Communications Act. For instance, the IFC apparently disagrees with the editorial positions taken by Storer. We cannot, of course, judge the content of Storer's editorials. Provided that the licensee's editorials are geared to serve the public interest, rather than only his private interest, and provided that the station has complied with the fairness doctrine obligation to allow for the reasonable opportunity for the presentation of contrasting viewpoints, no questions will arise with regard to statements of particular opinions and views which are identified as those of the licensee. We have no information before us that Storer has sought to serve only its private interests or that it has failed to comply with the fairness doctrine. See *Taft Broadcasting Co.*, FCC 72–1170 (1972). Further, some of IFC's other allegations involve questions of licensee news and programming judgment. As we have noted:

> Licensees are called upon to make thousands of journalistic judgments. In making those judgments, they find themselves bombarded or "pressured" by outside sources—by government officials, public figures, private groups, etc., all urging the importance of some development or emphasis on some particular viewpoint or spokesman in making a news or public affairs presentation.

National Citizens Committee for Broadcasting, 32 FCC 2d 824 (1971).

52. The Commission has repeatedly stated that it will not intervene in this area unless there is extrinsic evidence of deliberate distortion or staging or specific facts are submitted clearly establishing that the licensee has consistently failed to respond to issues or news events of public importance which, under the circumstances, he could not reasonably or in good faith ignore. *WSNT, Inc., supra.* There are no such facts offered in support of IFC's allegations. Further, there has been no showing "whether non-blacks are accorded different, more positive treatment than blacks." *Stone* v. *F.C.C., supra.* Even apart from the lack of any supporting data for IFC's criticisms of Storer's news programming, the licensee, of course, has broad discretion in determining what items are of interest to warrant coverage on his station, particularly in the matter of news events. *Universal Communications Corporation*, 27 FCC 2d 1022 (1971). The fact that the IFC may disagree with Storer's coverage of The Black Panther convention is immaterial and not the subject matter for a license renewal hearing. The IFC's criticisms of Storer's coverage boils down to a mere difference of opinion regarding the manner of presentation. With respect to Storer's use of a black clenched fist on some of its newscasts, we believe that the IFC's conclusions are wholly unwarranted. We also note that in recent years there has been an increasing appearance of minority group people in television, both in commercial matter and other programming, and that these people represent many aspects of American society. See *The Evening Star Broadcasting Co.*, 27 FCC 2d 316, 333 (1971); *Taft Broadcasting Co., supra.* In this regard, we do not believe that the IFC's general allegations are sufficient to raise a substantial and material question of fact as to whether Storer has inaccurately portrayed blacks in today's society. Further, concerning the program *The Hijack Conspiracy*, we find this allegation to be of such a minor nature as to be immaterial to a decision herein.

53. Finally, as noted above, the IFC also raises questions concerning Storer's employment record, both in numerical terms and in terms of placement of black employees. The Commission has

> * * * at no time indicated that "fully proportional" employment of minority groups is called for by our rules, since we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community. *Report and Order*, Docket No. 18244, 23 FCC 2d 430 (1970).

54. As we stated in *The Evening Star Broadcasting Company* (WMAL–TV), 27 FCC 2d 240 (1971), *affirmed sub nom., Chuck Stone* v. *Federal Communications Commission*, D.C. Cir., Case No. 71–1166 (June 30, 1972), *rehearing denied*, September 1, 1972, simply indicating the number of minorities employed by a licensee, without citing specific instances of discrimination or showing a conscious policy of exclusion, is insufficient to warrant designating a license renewal application for evidentiary hearing. There is no showing of specific instances of discrimination or a conscious policy of exclusion in this proceeding which would require an evidentiary exploration into Storer's employment policies and practices.

55. Further, while an extremely low rate of minority employment may raise questions requiring appropriate administrative inquiry, *Chuck Stone* v. *Federal Communications Commission*, *supra*, such is not the case in this proceeding. Rather, the facts in this proceeding disclose that the number of minorities employed by Storer fall within a range of reasonableness when considered in conjunction with the number of minorities in the Detroit standard metropolitan statistical area, which is comprised of 18.6 per cent minorities, primarily Negro. An examination of WJBK–TV's Annual Employment Reports for 1971 discloses that the station employed 233 persons, 45 of whom were minorities (44 blacks, 1 oriental). WJBK–TV's 1972 Annual Employment Report discloses a total workforce of 206 employees, 42 of whom were minorities (39 blacks, 2 oriental, 1 Spanish-surnamed American). Thus, in 1971 and 1972 minorities represented approximately 19 to 20 per cent of WJBK–TV's total workforce. Such an employment profile is well within a range of reasonableness. *Stone* v. *F.C.C.*, *supra*. Further, while the placement of minority and other employees in particular positions is a part of the licensee's discretion in the operation of its business, the facts also disclose that Storer employs blacks in other than menial positions. For instance, in 1971, 11 of 139 persons, or 8%, in what is normally considered high pay positions, were minorities. Similarly, in 1972, 11 of 138 persons, or 8%, in what is normally considered high pay positions were minorities. These facts, standing alone, refute IFC's charges. It is also noteworthy that Storer has developed an Equal Employment Opportunity Program. No facts have been submitted which would indicate that Storer's employment policies and practices contain barriers to equal opportunity in employment.

56. In conclusion, we believe that IFC's criticisms of Storer's operations are lacking in the requisite factual support to warrant an evidentiary hearing. The burden is on the license challenger to demonstrate

with specificity facts which would warrant grant of the requested relief. The IFC opens with a charge that Storer has conducted an inadequate survey. However, as noted above, Storer has substantially complied with the requirements of the Commission's *Primer*, *supra*, which was adopted nearly eight months subsequent to the filing of the subject renewal application. The IFC also charges Storer with inadequate and discriminatory programming. Several of the IFC's objections however are either unfounded or of such a nature as to be immaterial to a decision herein. Further, in criticizing WJBK–TV's programming, IFC's principal argument appears to be that Storer has failed to serve Detroit's black population. The obvious misconception in this argument is that Detroit's black communities are not interested in problems of general interest, and that their needs are served only by programs specifically designed for those groups. This theory has specifically been rejected by the Commission on a number of occasions. See *The Evening Star Broadcasting Co., supra; Taft Broadcasting Co., supra; WKBN Broadcasting Corporation*, 30 FCC 2d 958 (1971); *Mahoning Valley Broadcasting Corporation*, 39 FCC 2d 52 (1972); *Time-Life Broadcast, Inc.*, 33 FCC 2d 1981 (1972). Further, a mere review of Exhibits C, D and F of the subject renewal application clearly indicates that Storer's programming has been responsive to community problems, needs and interests and that some of this programming has dealt with subjects which are of special interest to blacks. A license challenger faces a substantial pleading burden; i.e., its allegations must be specific and supported by facts which would establish that a grant of the application would be *prima facie* inconsistent with the public interest:

> * * * with respect to past and proposed performance, we will not condition action on a renewal application upon a subjective determination of what is or is not a good program; rather our decision must be based on all analysis of the station's overall programming performance. Therefore, in order to make a *prima facie* case for denial of a renewal application, petitioners must submit specific allegations of fact which, if true, would establish that the licensee's overall past programming could not reasonably have met the needs and interests of the people within his service area, including the black community, and/or that his proposed programming is clearly inadequate to meet those needs and interests. *RadiOhio, Inc.*, 38 FCC 2d 721 (1971).

57. The IFC has failed to meet this burden with regard to WJBK–TV's programming. Similarly, the issues raised regarding Storer's employment record involve no substantial and material question of fact; instead, Storer has amply demonstrated its compliance with the Commission's rules and policies regarding equal employment opportunities.

58. In view of the above, IT IS ORDERED, That the Inter-Faith Centers for Racial Justice, Inc.'s Motion to Strike and Remove, filed May 20, 1971, IS DENIED.

59. IT IS FURTHER ORDERED, That Storer Broadcasting Co.'s Motion to Strike or, In the Alternative, to Accept Supplemental Pleading and Supplemental Pleading entitled Response to Reply, concurrently filed July 26, 1971, IS DENIED, in part, and GRANTED, in part, as set forth in paragraph 6 above.

60. IT IS FURTHER ORDERED, That Storer's Motion for Leave to File Statement Concerning Representation by Counsel and Participation of Commissioner, filed November 23, 1971, IS DENIED.

61. IT IS FURTHER ORDERED, That the Inter-Faith Centers for Racial Justice, Inc.'s petition for reconsideration, filed February 22, 1971, as amended February 25, 1971, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-705

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
SUDBRINK BROADCASTING, INC. OF FLORIDA,
LICENSEE OF RADIO STATION WLYF (FM),
MIAMI, FLA.
For Waiver of Section 73.1201(b) of the
Rules To Permit on-the-Air Identification as "Miami-Fort Lauderdale."

MEMORANDUM OPINION AND ORDER

(Adopted June 27, 1973; Released July 3, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE, AND HOOKS CONCURRING IN THE RESULT.

1. The Commission has for consideration the above-captioned application filed December 29, 1971; letter objections thereto filed February 4 and March 31, 1972, on behalf of WFTL Broadcasting Company, licensee of radio stations WFTL(AM) and FM, Fort Lauderdale, Florida; and related correspondence. WFTL relies on *Wometco Enterprises, Inc.*, 1 RR 2d 699 (1963), in which we denied, on economic grounds, the proposal of a Miami VHF television station to identify with Fort Lauderdale in the manner here proposed by WLYF. Since neither the Communications Act nor our rules of procedure provide a formal pre-grant remedy in this type of case, the complainant's letters are being treated as informal objections under section 1.587 of our rules.

2. The ground rules for obtaining AM and FM dual-city station identification authority were adopted October 25, 1967. *In re Amendment of Part 0 of the Commission's Rules—Commission Organization*—delegating to the Chief, Broadcast Bureau, authority under section 0.281(kk) to waive the provisions of section 73.1201(b) to allow multiple-city AM and FM station identification, upon proper request therefor 10 FCC 2d 527. The main objective we sought to achieve in delegating this authority to the staff was to align AM and FM dual-city identification privileges with those already obtainable by television licensees under section 0.281(d)(17).

3. In the 1967 Memorandum Opinion and Order accomplishing this change by adding new section 0.281(kk) to the list of matters delegated to the Chief, Broadcast Bureau, the delivery of a principal city signal to the second community (5/25 mV/m for AM; 3.16 mV/m for FM) was the only stated criterion for processing AM/FM dual-city identification waiver requests. Admittedly, it did not on its face bar "big city" stations from seeking identification with smaller neighbor-

ing communities. This does not mean, however, that such proposals showing the required technical coverage are automatically granted. The earlier order adopting the comparable delegation for processing dual-city identification waiver requests from television stations was also silent on the question of "big city" stations seeking identification with smaller neighboring communities, but by the same token did not foreclose the careful scrutiny of such requests. The justification for such scrutiny was explained in *Wometco* as follows:

> In the past, stations which have received waivers of section [73.1201(b)] of the rules have characteristically been stations in relatively small communities seeking identification either with neighboring communities or with larger nearby cities. In such cases, it appeared that the stations were motivated, at least in part, by economic considerations which led them to seek Commission recognition of the fact that their predicted principal city service contours encompassed other towns. In granting such waiver requests to stations in smaller communities, the Commission could, to at least a small extent, act to enhance the attractiveness of small town stations to national advertisers, by recognizing their predicted service contours, and thus improve their competitive position vis-a-vis big city stations. However, the Commission feels that the competitive and economic reasons which ordinarily justify waiver * * * are lacking in this situation. Further, the Commission is concerned that grant of the requested waiver might discourage possible applicants for Channel 39 at Fort Lauderdale, or make it more difficult for any station subsequently authorized on such channel to be successful.

4. We adhere to the views expressed in *Wometco Enterprises, supra*, and find no basis in logic for treating radio differently from television in this regard. While the UHF protection principle is, of course, not applicable here, WLYF, whose primary obligation is to the community of license (Miami, population 335,000) has simply not shown that the public interest would be served by identifying with a smaller community 15 miles away (Fort Lauderdale, population 140,000) in a different county, a different SMSA, and a different radio market.[1]

5. In an effort to demonstrate the pro-forma nature of actions taken under section 0.281 of the rules, WLYF has cited the grant of a number of dual-city authorizations to television licensees which allow their identification with outlying communities of smaller size; i.e., Sacramento-Stockton (California), Tampa-St. Petersburg (Florida), Huntsville-Decatur (Alabama), and Pueblo-Colorado Springs (Colorado). Significantly, and unlike Miami-Fort Lauderdale, these are either "twin cities" or non-adjoining communities within a single television market which, in either event, are situated within a single SMSA.

6. On the radio side, WLYF has cited our recent grant of dual-city identification authority to WFAA–FM Dallas ("Dallas-Fort Worth"). Since Dallas-Fort Worth and Miami-Fort Lauderdale are roughly comparable with respect to mileage separation and size relationship (Dallas and Miami being the larger cities), WLYF contends that there can be no valid basis for withholding the requested "Miami-Fort Lauderdale" identification. We cannot agree. Dallas-Fort Worth has, for many years, been treated as a single television market, on the basis of which WFAA–TV was, in 1960, authorized

[1] For ARB classification purposes, "Miami" and "Fort Lauderdale-Hollywood" are separate and distinct radio markets. Eight AM and FM broadcast stations are assigned to Fort Lauderdale.

to identify as "Dallas-Forth Worth." It is obvious that once a television licensee has qualified for dual-city station identification in this manner, there can be no rational objection to permitting similar on-air identification by co-owned AM and FM stations delivering principal city signals to the same communities. While Dallas and Fort Worth are still viewed by some as separate radio markets, they comprise, as already noted, a *single* television market and, unlike Miami-Fort Lauderdale, have been designated by the Office of Management and Budget as a *single* SMSA. OMB–64, April 27, 1973.

7. Finally, since there would be no objection to WLYF identifying promotionally with Fort Lauderdale—after announcing call letters and station location, as required by section 73.1201(b) of the rules—the denial of this proposal can hardly be said to involve matters of real substance. Under the facts and circumstances outlined above, the application is deniable without hearing. *United States et al.* v. *Storer Broadcasting Company*, 35. U.S. 192 (1956).

8. Accordingly, and in light of the uncontroverted matters raised in the objections, IT IS ORDERED, That the above-captioned application IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-636

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of THE CHICAGO FEDERATION OF LABOR AND INDUSTRIAL UNIONS COUNCIL, ASSIGNOR, AND ZENITH RADIO CORP., ASSIGNEE For Assignment of License and Contingent Application for Subscription Television Authorization	BAPCT-488 and BSTV-4

JUNE 13, 1973.

EDWARD K. WHEELER, ESQUIRE,
Wheeler and Wheeler,
Southern Building,
15th and H Streets NW.,
Washington, D.C. 20005.

JAMES E. GREELEY, ESQUIRE,
Suite 660
1990 M Street NW.,
Washington, D.C. 20036.

GENTLEMEN: This refers to the applications for the assignment of the license of Station WCFL-TV, Chicago, Illinois from The Chicago Federation of Labor and Industrial Unions Council to Zenith Radio Corporation (BAPCT-488), and the contingent application to authorize subscription television operations over WCFL-TV (BSTV-4). This refers also to the request of Zenith's counsel, dated March 2, 1973, that the above-referenced applications be dismissed under Section 1.525 of the Rules, on the ground Zenith Corporation has exercised its contract rights to terminate the agreement between it and the Federation. This refers further to the request of the Federation's counsel, dated March 6, 1973, that if the applications are dismissed, the Commission indicate by declaratory ruling or other means that the applications are being dismissed because of Zenith's failure to prosecute them in good faith, and to Zenith's opposition to such a ruling.

The request for dismissal of the applications is granted, and the applications are hereby dismissed.

The request for a declaratory ruling is denied. Whether Zenith has prosecuted the applications in good faith within the meaning of the relevant contract provisions referred to by the Federation involves factual and legal issues to be resolved by the courts. Under our long-standing policy respecting private contract litigation, the Commission declines to take a position on matters which are, or might become, the subject of private litigation.

Our dismissal of the applications rests solely on the termination clause and Zenith's request for dismissal. We have not decided and take no position on whether Zenith has or has not diligently prosecuted the applications in good faith, or on whether (as claimed by the Federation) Zenith is in default and is thus not in a position to avail itself of its termination of rights.

Commissioner H. Rex Lee was absent.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

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